No. 10,127

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE WASHINGTON WATER POWER COMPANY, a corporation; CITY BANK FARMERS TRUST COMPANY, a corporation; and RALPH E. MORTON, as Trustee,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the Eastern District of Washington, Northern Division

Brief for the Appellants

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

Appellee instituted suit to condemn uplands in Ferry and Stevens Counties, Washington, belonging to the appellant, The Washington Water Power Company, by serving a petition for condemnation upon the appellants and filing the same with the Clerk of

the United States District Court for the Eastern District of Washington, Northern Division.

The statutory provision which sustains the jurisdiction of the said district court is Section 257, Title 40, U. S. C. (August 1, 1888, c. 728, Sec. 1, 25 Stat. 357).

The statutory provision which sustains the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit is Section 225, Title 28 U. S. C. (March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; March 3, 1911, c. 231, Sec. 128, 36 Stat. 1133; January 28, 1915, c. 22, Sec. 2, 38 Stat. 803; February 7, 1925, c. 150, 43 Stat. 813; February 13, 1925, c. 229, Sec. 1, 43 Stat. 936) and Section 230, Title 28 U. S. C. (March 3, 1891, c. 517, Sec. 11, 26 Stat. 829; February 13, 1925, c. 229, Sec. 8(c), 43 Stat. 940) together with Rules of Civil Procedure, Rule 73 and Rule 81(a)(7).

The petition for condemnation is set forth on pages 2 to 20 of the Transcript of Record. In accordance with the practice prevailing in the state courts of Washington, no answer to the petition for condemnation was filed. Possession of and title to the said uplands was obtained by the United States Government by a judgment of taking (T. of R. p. 33) entered upon a declaration of taking (T. of R. p. 20). Final judgment was entered by the District Court on the 14th day of March, 1942 (T. of R. p. 294). Notice of appeal and bond were filed by appellant March 30, 1942 (T. of R. p. 307).

STATEMENT OF THE CASE

This is a condemnation suit brought by the United States of America to acquire a tract of upland partly in Ferry County, Washington, and partly in Stevens County, Washington, on opposite sides of the Columbia River at a point known as Kettle Falls, belonging to The Washington Water Power Company, a hydroelectric power company, operating in Eastern Washington and Northern Idaho, hereafter referred to as the Power Company. Also included was a small tract which it was agreed belonged to a Lillian Hummel, who accepted the amount deposited by the government and is no longer interested in the case.

The government condemned the property as part of the necessary reservoir for the Grand Coulee Dam. The trustees of The Washington Water Power Company's first mortgage were made parties and have joined with the Power Company in these proceedings, but as their interests are identical with those of the Power Company we will hereafter refer to the Power Company as if it were the only appellant.

The petition for condemnation together with the declaration of taking under 40 U. S. C. Sec. 258a, were filed on December 9, 1939, and at the same time the government d e p o s i t e d into court the sum of $7950.35 as the estimated value of the Power Company's land. As a result of a pretrial conference the government and the appellant entered into a stipulation (T. of R. p. 43) which provided in addition to provisions relating to the admissibility of documentary evidence, that the Power Company was the owner

of the land condemned. It was further stipulated that the Columbia River is a navigable stream throughout its entire length in the United States, that the lands of the appellant Power Company were riparian lands adjoining or adjacent to that part of the river bed commonly known as Kettle Falls, and that to utilize appellant's property for power site purposes would require the construction of a dam on and across the bed of the Columbia River and the construction of various structures in the channel of said stream and between the ordinary high water line and the low water line thereof; that a complete hydro-electric power plant could not be built solely on the defendant's lands but would require the use of lands within the bed of the Columbia River.

It was stipulated, however, that there could be safely constructed at Kettle Falls, partly on the lands of the appellant being condemned and partly in the bed of the river, a dam and power house to contain water turbines and generators operated ultimately under a maximum head of 124 feet and a minimum head of 75 feet and a mean static head of 114 feet, and that it is physically practical and feasible to operate such hydro-electric power development at Kettle Falls; that the value of appellant's lands for all purposes other than power site purposes, such as agricultural, grazing and timber purposes was the sum of $7,950.35; that if the Court should not permit the introduction of evidence relative to power site values then the award to the appellant should be the sum of $7,950.35.

At the trial Stevens and Ferry Counties which had

been made parties defendant in the action appeared and offered evidence relative to taxes which had been assessed against the property. Stipulations were read to the jury and the government called only one witness, F. H. Banks, Supervising Engineer of the Grand Coulee Dam, who testified that the Grand Coulee Dam improved navigation on the Columbia River. Petitioner then rested.

The appellant made an opening statement of the testimony it intended to offer in which it was stated that the appellant would offer to prove among other things that the land sought to be condemned by the government was part of a larger tract of land located at Kettle Falls on the Columbia River; that this land, due to its natural formation consisting of a rocky dike across the river formed a peculiarly suitable and adaptable site at which to erect a dam and hydro-electric power development; that these lands were formerly part of the Colville Indian Reservation; that since they were released from the Colville Indian Reservation in 1906 they have had an enhanced market value for power site purposes; that they were sold for $80,000 in 1906, resold in 1912 for $100,000, and finally sold to The Washington Water Power Company for $150,000 in 1921; that the appellant Power Company is a hydro-electric power company with assets in excess of seventy million dollars; that it is engaged in the production, distribution and sale of electrical energy throughout eastern Washington and northern Idaho; that the company had acquired the site for the purpose of building a hydro-electric power

plant and supplying itself with the electrical energy so generated; that the company has sufficient finances and financial backing to build the proposed development; that the proposed development would be economically profitable; that after acquiring the property the company has spent approximately $350,000 in engineering studies preliminary to the development of the site, such studies including surveying of the backwater reservoir, diamond drilling and wash boring, preparation of plans and specifications for the erection of a dam and power plant; that the company had made an application for a license to the Federal Power Commission for the development of the site; that such application was pending until 1936 at which time it was denied because the government decided to build the Grand Coulee Dam, the building of which would of necessity require appellant's property as part of its reservoir.

Appellant further indicated its intention to prove by qualified witnesses that taking into consideration the likelihood or the lack of likelihood that the Power Company could secure a license from the Federal Power Commission for the development of the site, that on December 9, 1939, these lands had an enhanced market value greatly in excess of their value for agricultural purposes; that such market value was in the neighborhood of one-half million dollars.

Objection to the introduction of any testimony tending to prove power site values was made and the matter argued at length to the Court who sustained the objection and ruled all such evidence would be in-

admissible. The appellant then made ninety offers of proof in the form and manner suggested by the Court, covering in detail the facts as outlined in the opening statement. Objections were sustained to all of these offers of proof except those dealing with the qualifications of witnesses. The government's motion for a directed verdict in the sum of $7,950.35 was granted and the jury at the direction of the Court returned the verdict in that amount upon which judgment was later entered.

There is but one principal question between the government and the appellant, The Washington Water Power Company presented by this appeal, to-wit: Should just compensation for uplands bordering upon a navigable stream be measured by their value for all purposes other than power-site purposes regardless of what their actual market value was at the time of taking, regardless of their suitability or adaptability for power site purposes, regardless of the likelihood that they could and would be used for power site purposes in the reasonably near future, regardless of whether the company had purchased the property for power site purposes and had expended large sums of money in preliminary and engineering development and regardless of whether the owner was financially able and ready to construct a hydro-electric project at the time the property was taken in the condemnation suit. In addition thereto a number of minor questions arose about the competency of the evidence proposed in connection with a limited number of the offers of proof.

SPECIFICATIONS OF ERROR

Specification of Error No. 1. The Court erred in entering judgment for appellant, The Washington Water Power Company in the sum of $7,950.35 (T. of R. p. 294).

Specification of Error No. 2. The Court erred in granting over the objection of the appellant, The Washington Water Power Company, petitioner's motion that the Court direct the jury to return a verdict in favor of the appellant, The Washington Water Power Company, finding that the value of the property is the sum of $7,950.35 (T. of R. p. 243).

Specification of Error No. 3. The Court erred in declining to give the instructions requested by the appellant, The Washington Water Power Company. The Court refused to give the proposed instructions hereinafter set out totidem verbis by the use of the following words uttered sua sponte for the purpose of making unnecessary any objection upon the part of the petitioner:

> "* * * Having done that, I will also decline to give the instructions offered by the defendant, The Washington Water Power Company, and allow an exception, and may the record show in each instance that the Court has specifically ruled that there was no necessity for separate exceptions for the failure to give each separate instruction because the decision which I made upon the question of the admissibility of evidence, so far as The Washington Water Power Company is concerned, made it unnecessary for them to take separate exceptions. It would not make any difference what was in the instructions. I couldn't give the jury any instructions when ruling as I

did, and the same exception with reference to the exceptions with reference to the counties." (T. of R. p. 249)

PROPOSED INSTRUCTION NO. 1 BY THE APPELLANT, THE WASHINGTON WATER POWER COMPANY

You are instructed that just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land, but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adapted and needed, or likely to be needed in the reasonably near future, is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of the demand for such use affects the market value while the property is privately held.

The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect the market value. To the extent that probable demand by prospective purchasers, or condemnor, affects market value, it is to be taken into account. Physical adaptability alone cannot be deemed to affect market value. There must be a reasonable possibility that the owner could use his tract, together with the other lands necessary for hydro-electric development, or that another could acquire all lands or easements necessary for that use.

You are instructed that the market value of property may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by fair

negotiations between an owner willing to sell and a purchaser desiring to buy.

In making that estimate you should take into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. The determination is to be made in the light of all facts affecting the market value that are shown by the evidence, taken in connection with those of such general notoriety as not to require proof. Elements affecting value that depend upon events in combinations of occurrences which, while in the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration. (T. of R. p. 283)

PROPOSED INSTRUCTION NO. 2 BY THE APPELLANT, THE WASHINGTON WATER POWER COMPANY

You are instructed that under the laws of the State of Washington, public service corporations organized for the purpose of, and authorized by law so to do, may acquire property necessary for the public use in connection with the development of hydro-electric plants by the exercise of eminent domain.

You are instructed that the defendants in the proof of the market value of their land, are not restricted to evidence of its value for development within itself.

You are further instructed that the fact that it might be necessary for a condemnor to exercise the right of eminent domain in order to acquire property for use in connection with the development of a hydro-electric plant does not negative consideration of the availability of the land here involved, for use in connection w i t h a hydro-electric plant. Elements affecting value that depend upon events, or combinations of occurrences, which are fairly shown to be reasonably probable,

may be taken into consideration in determining what constitutes just compensation for the property involved in this proceeding.

The enhanced market value, if any, of the defendant's land, due to its adaptability for valuable uses in conjunction with other properties, may be considered if the practicability of the combination of the necessary properties upon which such availability depends, was at the time of the condemnation so great as to have probably affected the public mind, and therefore to have enhanced the price which the purchaser might be expected to give.

The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. What the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact. (T. of R. p. 285)

PROPOSED INSTRUCTION NO. 3 BY THE APPELLANT, THE WASHINGTON WATER POWER COMPANY

In this case it is stipulated that the defendant's lands could not themselves alone be used for the purpose of developing power, but that it would be necessary to combine with them the bed of the Columbia River, the lands above the dam site which would be flooded, and the right to use the flow of the stream.

This fact alone does not mean, however, that the defendant's lands have no value for power site purposes. The correct test is whether from all the evidence it appears that the union of all these necessary properties was so reasonably practical that the possibility thereof had affected the

market price of defendant's land at the time of taking.

In this connection I instruct you that in considering what is just compensation you should determine the award for the property free from the effect that any of the actions of the condemnor, the United States of America, of which there is any evidence in this case, may have had on the value of the property at the time of taking (T. of R. p. 286)

PROPOSED INSTRUCTION NO. 4 BY THE APPELLANT, THE WASHINGTON WATER POWER COMPANY

I instruct you that the date of taking in this case is December 9, 1939, and you must determine the value of the property as of that date; that is, its fair market value on that date. However, in this regard, I instruct you that you may not consider an increased value due to the fact that the United States had by that date definitely committed itself to build the Grand Coulee project, and that this land was a necessary part of the project; and on the other hand, you should not consider any diminution in market value on that date due to any action on the part of the United States if said action reduced the value of said lands.

In other words, you must determine the value of the lands appropriated by the United States Government without giving any consideration whatever to the effect the action of the condemnor, the United States Government, of which there is any evidence in this case, may have had upon the value of the property at the time of taking. (T. of R. p. 287)

PROPOSED INSTRUCTION NO. 5 BY THE APPELLANT, THE WASHINGTON WATER POWER COMPANY

I instruct you that in determining the fair market value of the property you are entitled to take

into consideration all facts admitted in evidence which an informed seller, willing but not required to sell, and an informed buyer, willing but not required to buy, would take into consideration. Specifically if you find from the evidence that the property here in question was adapted for power site purposes, and that the property either could be used for the development of water power or sold at a greater price than it would otherwise bring because of a reasonable chance that it could be used for power site purposes, then you have a right to consider all the facts admitted in evidence which would affect such value. You may consider the investment the defendant has in the property, the price at which the property has sold in the past, taking into consideration the time which has elapsed since said sales, the likelihood that the property has increased or decreased in value during the interim, the sales of similar property, if any, the fact that the property is located on a navigable river, and that the defendant, or any private owner has no inherent right to own the waters of the river, or to erect structures in its bed, but must secure permission from the government to do so, together with any or all other matters or things which the evidence in this case indicates would increase or decrease the value of the property at the time of taking.

You may also consider the opinions of the witnesses who, because of their experience, were permitted to testify as experts. Taking into consideration all these elements, you are to determine a sum in money that in your opinion represents the fair market value of the property.

In this connection, however, I caution you that in determining the value of the property at the time of taking, you must fix such value at what would be the market value at that time, free from the effects of any action on the part of the condemnor, the United States Government, of which

there is any evidence in this case, which might increase or decrease the value of the property. (T. of R. p. 288)

PROPOSED INSTRUCTION NO. 6
BY THE APPELLANT, THE WASHINGTON WATER POWER COMPANY

I instruct you that the United States has the right to acquire the properties here involved by eminent domain. It is immaterial, therefore, whether the United States is acquiring them in aid of navigation or not. The defendant is entitled to receive the same amount of damages whether the lands are taken for a park, a post-office site, or as the bottom of a reservoir for the Grand Coulee Dam. (T. of R. p. 289)

PROPOSED INSTRUCTION NO. 7
BY THE APPELLANT, THE WASHINGTON WATER POWER COMPANY

You are further instructed that sales of land in the neighborhood and the prices received therefor, are to be disregarded by you in considering the market value of defendant's land involved in this proceeding, unless, when considered in the light of the testimony you are satisfied that there is real similarity between the land so sold and the land which is the subject of litigation in the case at bar. (T. of R. p. 290)

Specification of Error No. 4. The Court erred in sustaining the objection of appellee to Offer of Proof No. 1 by a qualified witness:

> "that the Kettle Falls site has been recognized in surveys and studies as one of the most suitable and feasible sites on the river for the development of electrical energy." (T. of R. p. 134)

Appellee's counsel objected to the foregoing offer of proof as follows:

"I object to the offer of proof upon the grounds stated in the argument." (T. of R. p. 135)*

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*Grounds urged for the objection to the foregoing offer of proof and those other offers of proof referred to in these specifications of errors, when stated in general terms by counsel for the appellee, were understood by the court and the attorneys for appellants and appellee to be as set forth in the following excerpt from the court's ruling:

"The evidence to which the Government objects was outlined in defendant's counsel's statement of last Tuesday. * * *

To this offer, plaintiff interposes two objections:

1. That under the rule laid down in U. S. vs. Chandler-Dunbar, 229 U. S. 53, followed in Continental Land Co. v. U. S., 88 Fed (2d) 104 (certiorari denied October 11, 1937, 302 U. S. 715) a riparian owner has no property right in the bed of the stream or to the use of the water or the power inherent therein as against the United States and is, therefore, barred from a recovery for any power site value of its riparian lands.

2. That, because paragraph 12 of the pre-trial stipulation includes an admission by defendant that the backwater from a dam constructed at Kettle Falls would flood approximately 518 tracts of privately owned land and approximately 400 different ownerships and would also flood some withdrawn or reserved public land of the United States (including Indian reservation land) and also some State land, therefore defendant is not entitled to recover power site value under the rule that no owner of any one or any number of tracts less than the whole is entitled to pay or share of the value of the whole in condemnation proceedings unless there is a reasonable probability that all the ownerships could be combined." (T. of R. p. 117)

Specification of Error No. 5. The Court erred in sustaining the objection of appellee to Offer of Proof No. 2 by a qualified witness:

> "that many projects have been constructed under the provisions of the Federal Power Act, and the reasonable prices for said sites have been included as legitimate expense on the part of the companies constructing said power projects." (T. of R. p. 135)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "I object to the offer on the grounds stated and upon the additional ground that the evidence offered is immaterial." (T. of R. p. 135)

Specification of Error No. 6. The Court erred in sustaining the objection of appellee to Offer of Proof No. 3 by a qualified witness:

> "that by the Act of August 30, 1935, the United States authorized and adopted the Grand Coulee Dam project providing for the erection of a dam of sufficient height to flood the lands of the defendant at Kettle Falls and completely eliminate the head of water at Kettle Falls; that the defendant's land has been taken by the United States in this proceeding as a part of said Grand Coulee Dam project; that had this development as a part of which the defendant's lands are being condemned, not been made, the defendant would at this time have been ready to construct a hydroelectric project at Kettle Falls." (T. of R. p. 136)

Appellee's counsel objected to the foregoing offer of Proof as follows:

> "We object on the general ground and also on the

special ground that the testimony offered would be immaterial." (T. of R. p. 137)

Specification of Error No. 7. The Court erred in sustaining the objection of appellee to Offer of Proof No. 4 by a qualified witness:

> "that the shore lands of the State of Washington adjoining the property of the defendant, The Washington Water Power Company, being herein condemned were negotiated for by The Washington Water Power Company with the State of Washington; that the State of Washington, acting by and through the Land Commissioner of said state, had agreed to sell said shore lands on each side of the Columbia River to the defendant, The Washington Water Power Company, for approximately $29,000, and that said agreement was in full force and effect and in good standing on August 30, 1935, when the United States Government authorized and adopted the Grand Coulee Dam Project." (T. of R. p. 137)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "I object to that on the general grounds." (T. of R. p. 138)

Specification of Error No. 8. The Court erred in sustaining the objection of appellee to Offer of Proof No. 5 by a qualified witness:

> "that The Washington Water Power Company had made application to the State Supervisor of Hydraulics by Applications Nos. 708 and 709, for permits to appropriate and store waters of the Columbia River; that its applications were prior in point of time to any other applications made with reference to the use of the waters of said river; that The Washington Water Power Com-

> pany did keep said applications in good standing and did pay all license fees due the State of Washington; that on July 17, 1934, the State Supervisor of Hydraulics advised The Washington Water Power Company that its applications to appropriate and store the waters at Kettle Falls would be kept in good standing until such time as the United States Government took steps to construct the high dam at Grand Coulee; that the aforesaid applications were finally canceled by the State Supervisor of Hydraulics after the United States Government started construction of said dam at Grand Coulee; and that said cancellation of said applications was the consequence of such construction by the United States of America." (T. of R. p. 138)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "I object on the general ground and also the special ground that the proof, if offered, would be immaterial." (T. of R. p. 139)

Specification of Error No. 9. The Court erred in sustaining the objection of appellee to Offer of Proof No. 6 by a qualified witness:

> "that as a result of and by reason of the action of the United States Government in authorizing and adopting the Grand Coulee Dam project under the Act of August 30, 1935, and by reason of the action of the United States Government in proceeding with the construction of the Grand Coulee high dam, the Supervisor of Hydraulics of the State of Washington canceled the said applications, Nos. 708 and 709." (T. of R. p. 139)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "We object to that upon the general grounds and

also on the special ground that it is immaterial, and furthermore, that the witness through whom the offer was made is incompetent to testify." (T. of R. p. 140)

Specification of Error No. 10. The Court erred in sustaining the objection of appellee to Offer of Proof No. 8 by a qualified witness:

"that during the period from 1921 to 1936, the defendant, The Washington Water Power Company, entered into and conducted negotiations with the Federal Power Commission to obtain a license to develop the power site on its lands which are the subject of this litigation and said negotiations continued until the Federal Power Commission denied the defendant a license to develop said site after Congress passed the Act of August 30, 1935, authorizing and approving the Grand Coulee Dam." (T. of R. p. 141)

Appellee's counsel objected to the foregoing offer of proof as follows:

"I object to that on the general grounds and on the special ground that it is immaterial and that the witness is incompetent to testify to the facts offered." (T. of R. p. 142)

Specification of Error No. 11. The Court erred in sustaining the objection of appellee to Offer of Proof No. 9 by a qualified witness:

"that during the time the defendant, The Washington Water Power Company, was making studies relative to the development of hydro-electric power at the Kettle Falls project after it was the owner of the lands here involved, and before the Act of August 30, 1935, authorizing and approving the Grand Coulee Dam project, it obtained original records of stream flow data and

river data relative to the Columbia River extending from the Canadian border to what is known as Rickey Rapids below Kettle Falls; this river data was made use of by the Bureau of Reclamation in making plans for the development of the Grand Coulee project and in connection with their hearings before the International Joint Commission relative to the encroachment of backwater into the Dominion of Canada during the period just prior to the submersion of the Kettle Falls property by the United States; that during the time it was making such studies of the Columbia River, the defendant, The Washington Water Power Company, built a gauging station on the Columbia River in connection with its engineering studies and that said gauging station was operated during said time by the United States Geological Survey at the request of the Bureau of Reclamation." (T. of R. p. 142)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground." (T. of R. p. 143)

Specification of Error No. 12. The Court erred in sustaining the objection of appellee to Offer of Proof No. 10 by a qualified witness:

"that topographical maps were made by The Washington Water Power Company on the territory along the Columbia River from the Canadian border to what is known as Rickey Rapids below Kettle Falls during the time it was making the aforesaid studies, which maps were furnished to the Bureau of Reclamation at its request and used by said Bureau of Reclamation in connection with its plans for the construction of Grand Coulee." (T. of R. p. 143)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "we object on the general objection and the special objection that it is immaterial." (T. of R. p. 144)

Specification of Error No. 13. The Court erred in sustaining the objection of appellee to Offer of Proof No. 11 by a qualified witness:

> "that the United States army engineers undertook to make a study of the Columbia River and its tributaries and a report was made, commonly known as the No. 308 report and published as Document No. 103. In this report the army engineers made use of all data obtained from the defendant in making studies of power development at Kettle Falls. All of this data was collected by The Washington Water Power Company during the time it owned said lands and during the times it was making said studies, under the direction of the District Engineer of the United States army engineers at Seattle, Washington, and a considerable part of said data was assembled at the specific request of said District Engineer of the United States army engineers." (T. of R. p. 144)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general grounds and upon the special ground that it is immaterial and that the witness through whom the offer is made is incompetent to testify." (T. of R. p. 145)

Specification of Error No. 14. The Court erred in sustaining the objection of appellee to Offer of Proof No. 12 by a qualified witness:

> "that the sum of $156,043.35 paid by the defendant, The Washington Water Power Company, for the lands involved in this proceeding was a reasonable price for said lands at the time they were purchased by the defendant, The Washington Water Power Company, in 1921." (T. of R. p. 145)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "The offer is objected to on the general grounds and furthermore, on the special ground that the testimony offered is immaterial and that the purchase price of the lands is not proper testimony as to the reasonable market value." (T. of R. p. 145)

Specification of Error No. 15. The Court erred in sustaining the objection of appellee to Offer of Proof No. 14 by a qualified witness:

> "that in the opinion of the said witness the highest use to which the land involved in this proceeding could be devoted would be as abutments for dams in connection with hydro-electric development; that the market value of these lands is not determined by the whole value of such hydro-electric development or by use of the waters of the Columbia River in connection therewith, but is only the value of the lands as abutment lands, taking into consideration all the facts in regard to the development and cost of the development and the amount of power that can be developed at the property; and likewise taking into consideration the likelihood or the lack of likelihood of obtaining the necessary license from the Federal Power Commission by which authority to construct a hydro-electric plant using these lands could be obtained in the reasonably near future; and the likelihood or lack of likelihood that other necessary consents to complete such hydro-electric

project could be obtained at a reasonable cost in the reasonably near future; that he is familiar with the fair market value of these lands based upon a consideration of the use of such land as abutments for dams in connection with a hydro-electric development; that the fair market value of the lands determined by a purchaser willing to purchase but not compelled to purchase and a seller willing to sell but not compelled to sell, both having in mind all of the considerations above set forth by the witness, would in his opinion be as of December 9, 1939, $500,000.00." (T. of R. p. 147)

Appellee's counsel objected to the foregoing offer of proof as follows:

"I object to the offer on the general grounds and upon the special ground that the witness would not be competent to testify as to the fair market value." (T. of R. p. 148)

Specification of Error No. 16. The Court erred in sustaining the objection of appellee to Offer of Proof No. 15 by a qualified witness:

"that shortly after acquiring the property The Washington Water Power Company made application to the Federal Power Commission for a preliminary permit on the 30th day of June, 1921; that a preliminary permit was issued designating said project as Project No. 229 on July 26, 1922; that after the granting of said preliminary permit The Washington Water Power Company proceeded to carry on the survey work necessary to obtain the data and information relative to the development of said site; that topographical surveys of the power site land and water surfaces contained within the limit of the project were prepared; that stream measurements were made of the Columbia River at the Town of Marcus; that

> foundation explorations were carried on, consisting of diamond drilling and wash boring of the proposed site; that said permit was maintained in good standing at all times; that application for a permit under the terms of the Federal Power Commission Act was prepared and the application was made to the Federal Power Commission on July 26, 1922; that on July 16, 1925, The Washington Water Power Company filed application for a Federal Power Commission License." (T. of R. p. 149)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "We object to the testimony offered on the general grounds and upon the special ground that the testimony offered is immaterial." (T. of R. p. 149)

Specification of Error No. 17. The Court erred in sustaining the objection of appellee to Offer of Proof No. 16 by a qualified witness:

> "that shortly after the application for the development of the Kettle Falls project was made, an application was made by The Washington Water Power Company in 1926 to develop the Chelan project. The Chelan project was a federal licensed project. That considerable correspondence developed between The Washington Water Power Company and the Federal Power Commission; that the Federal Power Commission approved and consented to the development of the Chelan site ahead of the Kettle Falls site; that the application for the Kettle Falls site was kept in good standing during this period." (T. of R. p. 150)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "We object to the testimony offered on the general grounds and upon the special ground that it is immaterial." (T. of R. p. 150)

Specification of Error No. 18. The Court erred in sustaining the objection of appellee to Offer of Proof No. 17 by a qualified witness:

> "that in 1928 Major Butler, District Engineer of the United States Army Engineers, requested The Washington Water Power Company to make detailed designs and to submit additional foundation data and other information relative to its application for license." (T. of R. p. 151)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general grounds." (T. of R. p. 152)

Specification of Error No. 19. The Court erred in sustaining the objection of appellee to Offer of Proof No. 18 by a qualified witness:

> "that the request of Major Butler, District Engineer of the United States army engineers, for detailed designs and additional foundation data and other information was complied with and the information submitted." (T. of R. p. 152)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general grounds." (T. of R. p. 152)

Specification of Error No. 20. The Court erred in sustaining the objection of appellee to Offer of Proof No. 19 by a qualified witness:

> "that in 1931 Major Butler, District Engineer of the United States army engineers, requested all of the data available of The Washington Water Power Company's studies of the 120-foot head project, and that such request was complied with on January 15, 1931." (T. of R. p. 152)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general grounds." (T. of R. p. 153)

Specification of Error No. 21. The Court erred in sustaining the objection of appellee to Offer of Proof No. 20 by a qualified witness:

> "that The Washington Water Power Company had completed and prepared all the necessary data, with survey maps, preliminary engineering studies for the purpose of showing that it was prepared on December 9, 1939, to start with the construction of the project." (T. of R. p. 153)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general grounds, and upon special ground that it is not material to the controversy here whether they were going to build on December, 1939, or at a later date." (T. of R. p. 153)

Specification of Error No. 22. The Court erred in sustaining the objection of appellee to Offer of Proof No. 21 by a qualified witness:

> "that he is familiar with the moneys actually spent by The Washington Water Power Company in the development work and that they were spent under his supervision; that The Washington Wat-

er Power Company spent the sum of $22,553.65 determining the stream flow of the Columbia River by means of various cables and supports across the Columbia River and construction of various gauges, including the automatic gauging station; that all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said lands, and that without the lands to which the said data applies, namely, the land involved herein, said data procured at the said cost of $22,553.65 becomes valueless and useless to the defendant or to anyone except the United States Government." (T. of R. p. 154)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to upon the general grounds and upon the special ground that the testimony as to expenditures made by the land owner would be immaterial as not having a bearing upon the fair market value for the lands in question." (T. of R. p. 154)

Specification of Error No. 23. The Court erred in sustaining the objection of appellee to Offer of Proof No. 22 by a qualified witness:

"that The Washington Water Power Company spent the sum of $20,597.52 installing gauges to establish water surface profiles on the Columbia River and also cross-sections of the river at these various gauges extending from the Canadian border to Rickey Rapids, a short distance between Kettle Falls; that all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said land; that said sum of

> $20,597.52 was necessary for compiling of said data, and that without the lands to which the said data applies, namely, the lands involved herein, said data becomes valueless and useless to The Washington Water Power Company and to anyone but the United States Government." (T. of R. p. 155)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to upon the general grounds and upon the special ground that expenditures made by the land owner have no tendency to prove the issues in this case as to the fair market value of the land." (T. of R. p. 156)

Specification of Error No. 24. The Court erred in sustaining the objection of appellee to Offer of Proof No. 23 by a qualified witness:

> "that The Washington Water Power Company spent the sum of $52,268.96 in the preparation of topographical maps of the banks of the Columbia River extending from the Canadian border to Rickey Rapids, a short distance below Kettle Falls; that these maps were necessary as part of the preliminary development of the construction of any hydro-electric project at Kettle Falls; that all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said lands; that said sum of $52,268.96 was necessary for the compiling of said data and that without the land to which the said data applies, namely the lands involved herein, said data becomes worthless and useless to defendant, The Washington Water Power Company, or anyone except the United States." (T. of R. p. 156)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to upon the general ground and upon the special ground that the offered testimony as to expenditures made upon the land in connection with any prospective use of the land would have no tendency to prove the issue of the fair market value." (T. of R. p. 157)

Specification of Error No. 25. The Court erred in sustaining the objection of appellee to Offer of Proof No. 24 by a qualified witness:

> "that The Washington Water Power Company spent the sum of $98,970.08 to make wash borings and diamond drillings for the purpose of exploring foundations and conditions of the project; that these diamond drillings and wash borings established that there was a sound rock foundation for the building of said dam; that said diamond drilling and wash borings were a necessary part of the construction of any project on the lands here involved and that without the said lands to which diamond drilling and wash boring applied, said data becomes valueless and useless to the defendant, or anyone except the United States." (T. of R. p. 157)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to upon the general ground and upon the special ground that the testimony offered to prove the expenditures in connection with the prospective use of this land has no tendency to prove the fair market value." (T. of R. p. 158)

Specification of Error No. 26. The Court erred in sustaining the objection of appellee to Offer of Proof No. 25 by a qualified witness:

"that diamond drilling and wash borings made by the defendant, The Washington Water Power Company, enhanced the value of said land; that they are valuable to a purchaser who desires to use these lands for the purpose of hydro-electric development." (T. of R. p. 158)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objection on the general ground and the special ground that the testimony as to expenditures of this kind has no tendency to prove the fair market value." (T. of R. p. 159)

Specification of Error No. 27. The Court erred in sustaining the objection of appellee to Offer of Proof No. 26 by a qualified witness:

"that The Washington Water Power Company spent the sum of $106,333.23 for general engineering studies, including various investigations and preparation of necessary data, including the design of the power house and details of all of the necessary pertinent works; that the general engineering studies made by the defendant, The Washington Water Power Company, were necessary as a preliminary expense in the construction of any hydro-electric project at Kettle Falls; that all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said lands; that without the land to which the said data applied, namely, the land involved herein, said data becomes valueless and useless to the defendant, The Washington Water Power Company, and to anyone else except the United States." (T. of R. p. 159)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to upon the general grounds and upon the special ground that the expenditures for engineering studies would have no value in proving the fair market value." (T. of R. p. 160)

Specification of Error No. 28. The Court erred in sustaining the objection of appellee to Offer of Proof No. 27 by a qualified witness:

> "that the total cost of The Washington Water Power Company's investment in this project for necessary preliminary engineering and survey work, including the cost of lands is $465,785.97, and that said sum is fair and reasonable. That all of said expenditures were for the purpose of securing data which was essential to the development of the Kettle Falls hydro-electric project and would be of value to a purchaser who purchased said lands; that without the lands here involved to which said data applies, said data becomes valueless and useless to the defendant, The Washington Water Power Company, and to anyone except the United States." (T. of R. p. 160)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "We object upon the general ground and upon the special ground that the evidence as to the total amount of expenditures on the land has no tendency to prove or establish the fair market value. (T. of R. p. 161)

Specification of Error No. 29. The Court erred in sustaining the objection of appellee to Offer of Proof No. 28, consisting of matters, allegations, and things set forth and contained upon pages 720 to 726, inclusive, of that report entitled, "The Columbia River and Minor Tributaries, House Document No. 103," that portion of said report so designated having then

and there been one of the documents covered by the stipulation relative to admission of evidence, which stipulation provided that said report should be admissible in evidence subject only to objections upon the ground of materiality or relevancy. The full substance of the matter set forth on pages 720 to 726 of said report and constituting said offer of proof cover the following matters and things:

> The undeveloped Kettle Falls powersite on the Columbia is located about 70 miles north of Spokane, Washington. Reefs and an island of quartzite rock create a natural water fall of about 37 feet. The Washington Water Power Company has drilled a considerable number of holes to explore the foundations. These explorations show that suitable foundations exist for the construction of structures to produce an average water fall of 114 feet for the development of hydroelectric power. Pondage would also be created to provide for daily variation in load. Exhaustive studies of stream flow and other conditions justify a proposed installed capacity of 447,700 kw. These studies considered the construction of the Columbia Basin Irrigation project, either by the construction of a low dam at Grand Coulee or with water from the Clark Fork and Spokane Rivers. The power development which includes the construction of a gravity type dam having 13 Stoney Sluice gates and an overflow section sufficient to pass a maximum flood of 875,000 c.f.s. and Power House containing 12 main units together with all auxiliaries and provision for navigation locks, if required, is estimated to cost $30,075,148 or $67 per kw for public development and $31,189,044 or $70 per kw for private development. The difference in cost is due to different rates of interest used during construction. An estimate of cost of operation shows that all cost to produce electric

> energy will be 1 mill per kwhr. for public development and 1.4 mills per kwhr. for private development. Estimates of annual operating cost frequently used by public utility companies would make the cost 2 mills per kwhr. Earlier plans of development are evidenced by a preliminary permit issued by the Federal Power Commission to The Washington Water Power Company and the resulting application for license. (T. of R. p. 161)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "I make no objection on the ground it wasn't read in its entirety but do object to it upon the general grounds." (T. of R. p. 163)

Specification of Error No. 30. The Court erred in sustaining the objection of appellee to Offer of Proof No. 29 (T. of R. p. 179) consisting of Defendant's Exhibit for identification 1, (T. of R. p. 256) being a copy of the preliminary permit for Project No. 229 granted by the Federal Power Commission to the defendant, The Washington Water Power Company, said document so designated having then and there been one of the documents covered by the stipulation relative to admission of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy.

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general grounds." (T. of R. p. 180)

Specification of Error No. 31. The Court erred in sus-

taining the objection of appellee to Offer of Proof No. 30 consisting of Defendant's Exhibit 2 for identification, being a copy of the application for a Federal Power Commission license, document so designated having then and there been one of the documents covered by the stipulation relative to admission of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy. (T. of R. p. 180)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground." (T. of R. p. 181)

Specification of Error No. 32. The Court erred in sustaining the objection of appellee to Offer of Proof No. 31 by a qualified witness:

> "that the witness, W. F. Miller, is the comptroller of The Washington Water Power Company and as such it is a part of his duties to keep a record of all of the expenditures and costs of The Washington Water Power Company; that the books and records of The Washington Water Power Company show that the said company has expended the sum of $156,043.33 for the acquisition of the lands at Kettle Falls; that after deducting from said amount the stipulated and agreed value. to-wit, $7,610, the value of the land not taken by the Government, which was originally purchased as a part of the Kettle Falls tract, the net original investment as represented by the purchase price of the land involved in this proceeding was on the 9th day of December, 1939, exclusive of interest and taxes, the sum of $148,433.33." (T. of R. p. 181)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to upon the general ground and upon the special ground that the investment of the company in the land not taken is not proper material testimony as to the fair market value of the lands which were taken." (T. of R. p. 181)

Specification of Error No. 33. The Court erred in sustaining the objection of appellee to Offer of Proof No. 32 by a qualified witness:

> "that the books and records of The Washington Water Power Company show that in addition to said sum expended for the purchase price of said land there has been expended for exploration, general engineering, surveying and other work in connection with the development of the project the further sum of $317,352.64." (T. of R. p. 182)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to upon the general ground and the special ground that the additional investment and cost to the landowner is not material on the question of the fair market value of the land." (T. of R. p. 182)

Specification of Error No. 34. The Court erred in sustaining the objection of appellee to Offer of Proof No. 33 by a qualified witness:

> "that in addition to the sums invested in the purchase price of said lands and for exploration, general engineering, surveying and other work in connection with the development of the Kettle Falls project, the sum of $66,832.90 was spent for taxes and fees in connection with water rights on

said Kettle Falls hydro-electric project." (T. of R. p. 183)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground and upon the special ground that the expenditures of the landowner by way of taxes paid and fees paid for water rights are not material on the question of the fair market value of the lands taken." (T. of R. p. 183)

Specification of Error No. 35. The Court erred in sustaining the objection of appellee to Offer of Proof No. 34 by a qualified witness:

> "that the sum of $156,043.33 paid by the defendant, The Washington Water Power Company, for the lands involved in this proceeding was a reasonable price for said land at the time it was purchased by the defendant, The Washington Water Power Company, in 1921." (T. of R. p. 183)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "objected to on the general ground and objected to on the special ground that the witness Miller is not shown to be competent to testify to the fair market value of the lands at the time of their acquisition." (T. of R. p. 184)

Specification of Error No. 36. The Court erred in sustaining the objection of appellee to Offer of Proof No. 35 by a qualified witness:

> "that the witness, K. M. Robinson, is president of The Washington Water Power Company, owner of the land sought to be condemned; that he

has been president of said company since June, 1938; that prior to said time he was president of the Idaho Power Company located in southern Idaho; that he has spent his entire life since the age of eighteen in the power business, that he is familiar with the lands involved in this proceeding which are the subject of this litigation; that said lands were purchased by The Washington Water Power Company in 1921, for the sum of $156,043.33; that the lands purchased at that time consisted of a tract of approximately 800 acres; that all of said lands at that time had little value for agriculture or timber purposes." (T. of R. p. 184)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground and upon the special ground that the cost of the land to The Washington Water Power Company is not material upon the question of their fair market value." (T. of R. p. 185)

Specification of Error No. 37. The Court erred in sustaining the objection of appellee to Offer of Proof No. 36 by a qualified witness:

"that when the said land was acquired by The Washington Water Power Company, the purchase price thereof was fixed by the buyer and seller on the basis of suitability and adaptability of said land for the purpose of building a dam and hydro-electric development and on the reasonable likelihood that said dam could and would be built." (T. of R. p. 185)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground and upon the special ground there is nothing in the offer of

proof that shows that the witness Robinson participated in or had any knowledge concerning the basis upon which the sale of the lands in question was made." (T. of R. p. 186)

Specification of Error No. 38. The Court erred in sustaining the objection of appellee to Offer of Proof No. 37 by a qualified witness:

"that on December 9, 1939, The Washington Water Power Company had grown to a point where its ability to produce electric energy was less than the demands of the customers. In the ordinary course of events a power company such as The Washington Water Power Company must make arrangements to provide additional sources of power to take care of increasing demands; that on December 9, 1939, it was imperative that the company develop an additional source of power; that had the Government not authorized and established the Grand Coulee project, The Washington Water Power Company would have continued with the development of and entered upon the construction of the power project at Kettle Falls on or before December 9, 1939." (T. of R. p. 187)

Appellee's counsel objected to the foregoing offer of proof as follows:

"The offer is objected to on the general ground." (T. of R. p. 187)

Specification of Error No. 39. The Court erred in sustaining the objection of appellee to Offer of Proof No. 38 by a qualified witness:

"that he is familiar with power sites in the northwest and he knows what such sites have been bought and sold for, and by reason of his experience as president of the Idaho Power Company

> and The Washington Water Power Company, he is familiar with power sites and the prices for which they are bought and sold. Due to his connection with the power industry he is familiar with what other companies in the northwest have paid to secure power sites." (T. of R. p. 188)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground." (T. of R. p. 188)

Specification of Error No. 40. The Court erred in sustaining the objection of appellee to Offer of Proof No. 39 by a qualified witness:

> "that The Washington Water Power Company has expended the sum of $148,433.33 for the purchase of the lands involved in this proceeding, and in addition to that The Washington Water Power Company has expended the sum of $317,-352.64 for exploration, general engineering, surveying and other work in connection with the development of the project; that all such expenditures represent a legitimate net investment of The Washington Water Power Company in the sum invested in the property; that the total legitimate net investment on December 9, 1939, was $465,785.97; that had The Washington Water Power Company been granted a license to develop this project by the Federal Power Commission it would have been permitted to capitalize its legitimate net investment in the property, but would have been permitted to capitalize or earn no sum in excess of its legitimate net investment in the property." (T. of R. p. 188)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground and in addition upon the special ground that the expenditures of the company in connection with the acquisition and development of this land and this legitimate net investment, so-called, in the lands are not material on the question of fair market value." (T. of R. p. 189)

Specification of Error No. 41. The Court erred in sustaining the objection of appellee to Offer of Proof No. 40 by a qualified witness:

"that interest on the sum of the total legitimate investment of $465,785.97 for a period of three years prior to December 9, 1939, at the rate of six per cent per annum, amounted to $83,841.47; that the total net investment plus interest for a three-year period amounted to $549,627.44." (T. of R. p. 189)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to upon the general ground and upon the special ground that the evidence offered is not material upon the question of fair market value and that the interest at six per cent per annum for a period of three years prior to December 9, 1939, has no tendency to establish the fair market value." (T. of R. p. 190)

Specification of Error No. 42. The Court erred in sustaining the objection of appellee to Offer of Proof No. 41 by a qualified witness:

"that he is president of The Washington Water Power Company, the owner of the lands involved in this proceeding; that he is familiar with the fair market value of those lands on December 9, 1939; that taking into consideration all of the uses for which the lands are suitable and adapt-

> able and to which they may be devoted in the reasonably near future, and taking into consideration the likelihood or lack of likelihood that the necessary permits and consents from the Federal Government could be obtained to use said lands for a dam site or hydro-electric development, that in his opinion the reasonable market value of this property on December 9, 1939, was $549,627.44; and further, that he was president of the company on December 9, 1939, as well as the present time." (T. of R. p. 191)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground." (T. of R. p. 192)

Specification of Error No. 43. The Court erred in sustaining the objection of appellee to Offer of Proof No. 43 by a qualified witness:

> "that he is familiar with the practices of the Federal Power Commission in granting licenses for hydro-electric projects subject to Federal license; that he has appeared and testified before such commissions and knows the practices of the Commission in determining the legitimate net investment in connection with such projects; that he knows the amount of the expenditures made by The Washington Water Power Company for engineering, diamond drilling, surveys and other work in connection with the Kettle Falls project; that in his opinion all of such expenditures, amounting to the sum of $465,785.97, were legitimate, proper, and fair and reasonable." (T. of R. p. 195)

Appellee's counsel objected to the foregoing offer to proof as follows:

> "Objected to on the general ground and upon the

special ground that the opinion of the witness as to the reasonable expenditures in connection with the development of the property is not admissible or has no tendency to prove or disprove the fair market value of the land being taken in this proceeding." (T. of R. p. 196)

Specification of Error No. 44. The Court erred in sustaining the objection of appellee to Offer of Proof No. 44 by a qualified witness:

> "that he is familiar with the generating facilities, power resources and the growth of load of The Washington Water Power Company, that he has participated in a number of studies to determine what additional economical power sources are available to The Washington Water Power Company; that some of the investigations and studies leading up to the development, as well as the designs, of the Hood River hydro-electric plant of the Pacific Power and Light Company, the Lewiston hydro-electric plant of The Washington Water Power Company, the Morony and Flathead hydro-electric plant of the Montana Power and Light Company were carried out under his supervision; that utilizing United States geological survey records of stream flow of the Columbia River at Kettle Falls covering a period from 1913 to 1939, and utilizing the hydraulic head to be developed at that site, the average monthly power available at Kettle Falls was determined for the initial, intermediate and ultimate stages of said development." (T. of R. p. 196)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general grounds." (T. of R. p. 197)

Specification of Error No. 45. The Court erred in sus-

taining the objection of appellee to Offer of Proof No. 45 by a qualified witness:

> "that he studied the load of The Washington Water Power Company, of eight interconnected public utilities in the northwest, and of the entire public utility load in the States of Montana, Washington and Oregon over the entire period for which records are available; that the output of the Kettle Falls plant would fit into the load requirements of The Washington Water Power system and would furnish additional low-cost power to its neighboring interconnected systems; that under increasing load conditions which were apparent as early as 1937, the construction of the initial stage of Kettle Falls would have been undertaken at about that time; that this need for additional capacity and energy is proven by the purchases of power which The Washington Water Power Company has made from the Montana Power Company, Puget Sound Power and Light Company and from the Northwestern Electric Company since 1937; that under the present rate of load growth the output of the initial installation at Kettle Falls would have been absorbed by the interconnected systems within approximately three years; that Kettle Falls is the one site on the Columbia River that lends itself best to development in stages so as to meet growing load demands without entailing excessive investment costs when the plant is first built; that general layout plans have been prepared for the initial development, intermediate development and ultimate development; that the initial development will develop 42,000 kilowatts, the intermediate development 140,000 kilowatts, and the ultimate 360,000 kilowatts; that these plans have been prepared in sufficient detail to determine the present day cost of each stage of development; that the present day cost of the initial stage of development would be $10,735,000; that the additional cost for the intermediate stage would be $9,674,-

000, and an additional $10,500,000 for the ultimate stage, making a total cost for the initial stage of $10,735,000, for the second stage, $20,409,000, and the ultimate development, $30,911,000; that for the ultimate development the cost per kilowatt would be eighty-six dollars; that adding $3,205,-000 for the lands and rights not owned by The Washington Water Power Company would be $34,116,000, or the equivalent of $95.70 per kilowatt of installed capacity; that the present day costs are higher than the costs in 1939, but present day costs have been used because the construction period of such dam would be in the neighborhood of two to three years; that the cost of a 154 kilowatt transmission line from the site to Spokane would be $1,381,400, including terminal station facilities in Spokane; that the cost of energy from the initial stage development would be 2.3 mills at 100 per cent load factor and 3.85 mills at sixty per cent load factor; that the cost of energy for the combined initial and intermediate stages would be approximately 2.16 mills at sixty per cent load factor; that the cost of energy for the ultimate development would be approximately 1.40 mills at sixty per cent load factor; that the cost of power from Kettle Falls, even for the initial stage, would be reasonable and considerably below what the company has paid since December 1, 1939, and now pays for purchased power." (T. of R. p. 197)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to upon the general ground." (T. of R. p. 199)

Specification of Error No. 46. The Court erred in sustaining the objection of appellee to Offer of Proof No. 46 by a qualified witness:

> "that based upon his experience in analyzing and evaluating water power sites on navigable and non-navigable streams, it is his judgment that the undeveloped Kettle Falls site in 1939 had a value considerably in excess of the money already invested in the site, to-wit, $465,785.57." (T. of R. p. 200)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground." (T. of R. p. 200)

Specification of Error No. 47. The Court erred in sustaining the objection of appellee to Offer of Proof N. 47 by a qualified witness:

> "that the completion of the initial stage of development (42,000 kilowatts) would cause a substantial increase in the value of the site to The Washington Water Power Company." (T. of R. p. 200)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground and upon the special ground that the increase in value due to the completion of the initial unit would not have any tendency to prove the fair market value in December, 1939." (T. of R. p. 200)

Specification of Error No. 48. The Court erred in sustaining the objection of appellee to Offer of Proof No. 48 by a qualified witness:

> "that the cost of power from Kettle Falls initial stage would be reasonable and considerably below what the company has paid on and since December 9, 1939, and now pays for purchased power." (T. of R. p. 201)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground and upon the special ground that the cost of power development in that project would be less than the company is paying now has no tendency to establish a fair market value." (T. of R. p. 201)

Specification of Error No. 49. The Court erred in sustaining the objection of appellee to Offer of Proof No. 49 by a qualified witness:

> "that the uplands involved herein, because of their geographic formation and topographic features, making them adaptable for the support of hydro-electric structures, have a greater value for use in connection with the Kettle Falls project than have lands which are necessary for reservoir purposes in connection with this hydro-electric project." (T. of R. p. 202)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground." (T. of R. p. 202)

Specification of Error No. 50. The Court erred in sustaining the objection of appellee to Offer of Proof No. 50 by a qualified witness:

> "that the sum of $156,043.33 paid by the defendant, The Washington Water Power Company, for the lands involved in this proceeding was a reasonable price for said lands at the time that they were purchased by the defendant, The Washington Water Power Company in 1921." (T. of R. p. 202)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground and the special ground that the price paid in 1921 is not material on the question of the fair market value in 1939." (T. of R. p. 202)

Specification of Error No. 51. The Court erred in sustaining the objection of appellee to Offer of Proof Nos. 51, 57, 63, and 71 by qualified witnesses, said offers of proof being similar and the substance of each thereof being:

> "that the lands of the defendant, The Washington Water Power Company involved in this proceeding and for which the jury is to make an award in this proceeding, did on the 9th day of December, 1939, have an enhanced market value because of their extent, particular location and relation to the Columbia River and the rock formation on said lands, and because of the value said lands would have as a part of and for use in connection with any undertaking to create a hydro-electric power development, part of which would be on said lands." (T. of R. pp. 203, 209, 216, 225)

Appellee's counsel objected to the foregoing offers of proof, Nos. 51, 57, 63 and 71, as follows:

> "Objected to on the general grounds." (T. of R. pp. 203, 210, 216, 225)

Specification of Error No. 52. The Court erred in sustaining the objection of appellee to Offer of Proof No. 53 by a qualified witness:

> "that he is familiar with the fair market value on December 9, 1939, of the uplands of The Washington Water Power Company, located at Kettle Falls, involved in this proceeding, taking into con-

> sideration all the uses for which they are reasonably suitable and adaptable; that in his opinion the fair market value of said uplands of The Washington Water Power Company on December 9, 1939, was the sum of $500,000." (T. of R. p. 205)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to upon the general ground." (T. of R. p. 205)

Specification of Error No. 53. The Court erred in sustaining the objection of appellee to Offer of Proof No. 54 by a qualified witness:

> "that the sum of $156,043.33 paid by the defendant, The Washington Water Power Company for the lands involved in this proceeding was a reasonable price for said lands at the time that they were purchased by the defendant, The Washington Water Power Company in 1921." (T. of R. p. 205)

Appellee's counsel objected to the foregoing offer of of proof as follows:

> "Objected to on the general ground and objected to on the special ground that the fair market value of the lands in 1921 has no tendency to establish the fair market value of the lands on December 9, 1939." (T. of R. p. 206)

Specification of Error No. 54. The Court erred in sustaining the objection of appellee to Offer of Proof No. 55 by a qualified witness:

> "that he is familiar with power site values in the State of Washington as of December 9, 1939; that the demand for power was greater on December 9, 1939, than it was during the year 1921,

and that power site values were generally higher in the State of Washington on December 9, 1939, than they were during the year 1921." (T. of R. p. 207)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground." (T. of R. p. 208)

Specification of Error No. 55. The Court erred in sustaining the objection of appellee to Offer of Proof No. 56 by a qualified witness:

"that in the opinion of said witness the highest use to which the lands involved in this proceeding could be devoted would be as abutments for dams in connection with hydro-electric development; that the market value of these lands is not determined by the whole value of said hydro-electric development, or by use of the waters of the Columbia River in connection therewith, but is only the value of the land as abutment lands taking into consideration all the facts in regard to the development and cost of the development and the amount of power that can be developed at the property; and likewise taking into consideration the likelihood or lack of likelihood of obtaining the necessary license from the Federal Power Commission by which authority to construct a hydro-electric project using these lands could be obtained in the reasonably near future; and the likelihood or lack of likelihood that other necessary consents to complete said hydro-electric project could be obtained at a reasonable cost in the reasonably near future; that he is familiar with the fair market value of these lands based upon a consideration of the use of such lands as abutment for dams in connection with a hydro-electric development; that the fair market value of the lands determined by a purchaser willing to

> purchase but not compelled to purchase and a seller willing to sell but not compelled to sell, both having in mind all of the considerations above set forth by the witness, would in his opinion be as of December 9, 1939, $500,000." (T. of R. p. 208)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general grounds." (T. of R. p. 209)

Specification of Error No. 56. The Court erred in sustaining the objection of appellee to Offer of Proof No. 58 by a qualified witness:

> "that the witness J. P. Graves purchased the lands involved in this action in 1906 for the sum of $80,000 immediately upon the lands in Ferry County being released to public ownership upon the opening of the Colville Indian Reservation; that the lands purchased by him at that time were purchased for the purpose of their use as abutments for hydro-electric developments or dams in the Columbia River; that the lands at that time had little or no value for agricultural, grazing or other purposes; that the lands were sold by him in the year 1912 to the Granby Consolidated Mines Company for the sum of $100,000; that the lands so sold were sold for the purpose of use as lands for the abutment of a power site development at Kettle Falls to be made by the Granby Consolidated Mining Company for use in connection with their copper mining activities; that he was a member of the Board of Directors of the Granby Consolidated Mining Company; that the Granby Company sold these lands to The Washington Water Power Company in the year 1921 for the sum of approximately $150,000." (T. of R. p. 210)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to upon the general ground and upon the special ground that the purpose for which the lands were purchased by the witness Graves or the purpose for which the lands were sold by the witness Graves to the Granby Company and the figures on which the several sales were consummated are not admissible as having any tendency to establish the fair market value of the lands on December 9, 1939." (T. of R. p. 211)

Specification of Error No. 57. The Court erred in sustaining the objection of appellee to Offer of Proof No. 60 by a qualified witness:

> "that in the opinion of the said witness the said land is suitable and adaptable for use in connection with the development of hydro-electric power, and that in his opinion said property would have been devoted to said use on the 9th of December, 1939, or within the reasonably near future thereafter, had it not been for the Act passed by Congress on August 30, 1935, authorizing and approving the Grand Coulee Dam." (T. of R. p. 213)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "We object to that on the general ground and upon the special ground that the testimony offered would be merely a conclusion of the witness." (T. of R. p. 213)

Specification of Error No. 58. The Court erred in sustaining the objection of appellee to Offer of Proof No. 61 by a qualified witness:

> "that the witness is familiar with the Rock Island site owned by the Puget Sound Power and Light

Company on the Columbia River near Wenatchee, Washington; that said power site is similar in all essential respects to the power site of the defendant at Kettle Falls, Washington; that said power site is located on the same river, which is a navigable stream; that it was necessary to secure permission from the Federal Power Commission to develop the Rock Island site; that one of the elements to be taken into consideration in determining the value of land adaptable or suitable for a power site is the amount of horsepower which it would be reasonably possible to develop at such site; that, generally speaking, the construction problems and the available market conditions at the Rock Island site and the Kettle Falls site were on December 9, 1939, so similar that the relative value per horsepower for each site is the same; that the witness is familiar with the prices that were actually paid for the lands in the Rock Island dam site; that the lands on either side of the Columbia River on which stand the abutments of the Rock Island Dam, and the island in the middle of the river at said Rock Island damsite were purchased for $120,000 by the Puget Sound Power and Light Company in 1929; that the said lands on either side of the river on which stand the abutments of the Rock Island dam were purchased by the Puget Sound Power and Light Company before it received any license from the Federal Power Commission to develop any hydroelectric power at this point." (T. of R. p. 214)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground and upon the special ground that the testimony of the witness as to the acquisition of the power site at Rock Island dam does not have any tendency to establish the fair market value of the site in this case or the lands in this case; furthermore, upon the special ground that the fact that the lands at Rock

> Island were purchased prior to the issuance of a license by the Federal Power Commission is not material in the determination of the fair market value of the lands." (T. of R. p. 215)

Specification of Error No. 59. The Court erred in sustaining the objection of appellee to Offer of Proof No. 62 by a qualified witness:

> "that in the opinion of said witness the fair market value of said property on December 9, 1939, taking into consideration all of the uses for which it was available and adaptable, and to which it might be put in the reasonably near future after said date, was the sum of $480,000." (T. of R. p. 215)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general grounds." (T. of R. p. 216)

Specification of Error No. 60. The Court erred in sustaining the objection of appellee to Offer of Proof No. 64 by a qualified witness:

> "that in the absence of unusual conditions, uplands adaptable and suitable for supporting abutments for dams have greater values for use in connection with hydro-electric projects than have lands which are necessary for reservoir purposes in connection with such hydro-electric projects." (T. of R. p. 217)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground." (T. of R. p. 217)

Specification of Error No. 61. The Court erred in sustaining the objection of appellee to Offer of Proof No. 65 by a qualified witness:

> "that the sum of $156.043.33 paid by the Defendant, The Washington Water Power Company for the lands involved in this proceeding was a reasonable price for said lands at the time that they were purchased by the defendant, The Washington Water Power Company in 1921." (T. of R. p. 217)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground and objected to on the special ground that the fair market value of the lands in 1921 has no materiality to the market value of the lands on December 9, 1939." (T. of R. p. 217)

Specification of Error No. 62. The Court erred in sustaining the objection of appellee to Offer of Proof No. 66 by a qualified witness:

> "that he is familiar with power site values in the State of Washington as of December 9, 1939; that the demand for power was greater on December 9, 1939, than it was during the year 1921, and that power site values were higher in the State of Washington on December 9, 1939, than they were during the year 1921." (T. of R. p. 218)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground." (T. of R. p. 218)

Specification of Error No. 63. The Court erred in sus-

taining the objection of appellee to Offer of Proof No. 67 by a qualified witness:

> "that in the opinion of said witness the highest use to which the lands involved in this proceeding could be devoted would be as abutments for dams in connection with hydro-electric development; that the market value of these lands is not determined by the whole value of said hydro-electric development, or by use of the waters of the Columbia River in connection therewith, but is only the value of the lands as abutment lands taking into consideration all the facts in regard to the development and cost of the development and the amount of power that can be developed at the property; and likewise taking into consideration the likelihood or the lack of likelihood of obtaining the necessary license from the Federal Power Commission by which authority to construct a hydro-electric project using these lands could be obtained in the reasonably near future; and the likelihood or lack of likelihood that other necessary consents to complete such hydro-electric project could be obtained at a reasonable cost in the reasonably near future; that he is familiar with the fair market value of these lands based upon a consideration of the use of such lands as abutments for dams in connection with a hydro-electric development; that the fair market value of the land determined by a purchaser willing to purchase but not compelled to purchase and a seller willing to sell but not compelled to sell, both having in mind all of the consideration above set forth by the witness, would in his opinion be as of December 9, 1939, $480,000." (T. of R. p. 218)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground and objected to on the additional ground that the witness has

not established his competency to testify on that question." (T. of R. p. 219)

Specification of Error No. 64. The Court erred in sustaining the objection of appellee to Offer of Proof No. 69 by a qualified witness:

> "that in the opinion of said witness the highest use to which the lands involved in this proceeding could be devoted would be as abutments for dams in connection with hydro-electric development; that the market value of these lands is not determined by the whole value of such hydro-electric development, or by use of the waters of the Columbia River in connection therewith, but is only the value of the lands as abutment lands taking into consideration all the facts in regard to the development and cost of the development and the amount of power that can be developed at the property; and likewise taking into consideration the likelihood or the lack of likelihood of obtaining the necessary license from the Federal Power Commission by which authority to construct a hydro-electric project using these lands could be obtained in the reasonably near future; and the likelihood or lack of likelihood that other necessary consents to complete such hydro-electric project could be obtained at a reasonable cost in the reasonably near future; that he is familiar with the fair market value of these lands based upon a consideration of the use of such lands as abutments for dams in connection with a hydro-electric development; that the fair market value of the lands as determined by a purchaser willing to purchase but not compelled to purchase and a seller willing to sell but not compelled to sell, both having in mind all of the considerations above set forth by the witness, would in his opinion be as of December 9, 1939, $500,000." (T. of R. p. 222)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground and upon the special ground that the qualifications of the witness to testify on the value of land in this area has not been established." (T. of R. p. 223)

Specification of Error No. 65. The Court erred in sustaining the objection of appellee to Offer of Proof No. 70 by a qualified witness:

"that he is familiar with the practices of the Federal Power Commission in granting licenses for hydro-electric projects upon navigable rivers and Government land; that he has appeared and testified before said Commission in connection with the land costs and legitimate net investment of said projects, including at least thirteen major cases; that he is familiar with the practices of the Federal Power Commission in determining legitimate net investment in Federally licensed projects; that on the average the costs allowed for power site lands has averaged approximately $39.00 per kilowatt of primary capacity; that the abutment lands necessary for the actual construction of power house facilities are from six to seven times as valuable as the upstream storage lands; that this value has been consistently recognized, allowed and approved by the Federal Power Commission in the licensing of Federal power projects." (T. of R. p. 223)

Appellee's counsel objected to the foregoing offer of proof as follows:

"Objected to on the general ground and the special ground that one not connected with the Federal Power Commission cannot testify as to the policy of that Commission; furthermore, that some of the testimony offered would be purely speculative and constitute a conclusion of the witness as to what might or might not be done." (T. of R. p. 224)

Specification of Error No. 66. The Court erred in sustaining the objection of appellee to Offer of Proof No. 72 by a qualified witness:

> "that he has been familiar with the practices of and the policies of the United States Government for more than forty years; that the policy of the Government in connection with the development of economically feasible power projects upon Government lands or on navigable streams under the control of the Government has been to encourage and promote development of these projects under proper restrictions and licenses; that the likelihood of obtaining necessary permissions and consents to develop these p r o j e c t s is one of the elements considered by prospective purchasers and owners of said sites, and is one of the elements entered into in determining the fair market value of the said sites; that he is familiar with the practices and policies of the Federal Power Commission in connection with the granting of licenses for the development of power sites on the Columbia River; that the Federal Power Commission has granted licenses to private capital to own and develop a power site at Rock Island on the Columbia River and that such fact would be given consideration by the purchasers of power site land adjacent to the Columbia River." (T. of R. p. 225)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground and on the special ground that the testimony offered is speculative and based upon the opinion of this witness as to the policy of the Federal Power Commission." (T. of R. p. 226)

Specification of Error No. 67. The Court erred in sustaining the objection of appellee to Offer of Proof No. 73 by a qualified witness:

> "that he knows the amount of expenditures made by The Washington Water Power Company for engineering, diamond drilling, surveys and other work in connection with the Kettle Falls project, including the acquisition of the necessary abutment lands; that the lands involved in this proceeding, including expenditures amounting to the sum of $465,785.97, in his opinion are legitimate, proper, fair and reasonable and would be allowed as legitimate net investment if said projects were to be licensed." (T. of R. p. 228)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "The offer is objected to upon the general ground stated yesterday and upon the special ground that the testimony would be predicated upon the expenditures made by the landowners." (T. of R. p. 228)

Specification of Error No. 68. The Court erred in sustaining the objection of appellee to Offer of Proof No. 74 by a qualified witness:

> "that the sum of $156,043.33 paid by the defendant, The Washington Water Power Company, for the lands involved in this proceeding was a reasonable price for said lands at the time that they were purchased by The Washington Water Power Company in 1921." (T. of R. p. 228)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground and upon the special ground that the fair value of the land in 1921 is not in issue in this proceeding." (T. of R. p. 229)

Specification of Error No. 69. The Court erred in sus-

taining the objection of appellee to Offer of Proof No. 75 by a qualified witness:

> "that he is familiar with power site values generally throughout the United States as of December 9, 1939; that the demand for power sites was greater in the State of Washington on December 9, 1939, than it was in 1921; and that said power site values were higher throughout the United States and in the State of Washington on December 9, 1939, than they were in 1921." (T. of R. p. 229)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground and upon the special ground that the offered testimony is obviously based upon the price paid by The Washington Water Power Company in 1921, and therefore is inadmissible as evidence." (T. of R. p. 229)

Specification of Error No. 70. The Court erred in sustaining the objection of appellee to Offer of Proof No. 76 by means of the official records and reports of the Federal Power Commission:

> "That it has been the policy of the Federal Power Commission to encourage the development of power sites upon navigable streams by financially responsible parties.
>
> "That where the facts and circumstances surrounding the development of the power site show that the party applying therefor has the necessary financial backing to develop the site, that the amount of electricity can be properly used and disposed of, the policy of the Commission has been to grant such application." (T. of R. p. 230)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground and upon the special ground that there is not sufficient identification of the reports and documents of the Federal Power Commission in order to make it possible to determine whether or not such reports indicate any such general policy." (T. of R. p. 230)

Specification of Error No. 71. The Court erred in sustaining the objection of appellee to Offer of Proof No. 77 by a qualified witness:

> "that The Washington Water Power Company is a public utility company organized and existing under the laws of the State of Washington; that it is a subsidiary company of the American Power and Light Company and a member of the Electric Bond and Share Company system; that on December 9, 1939, The Washington Water Power Company had sufficient assets and financial backing to have obtained the funds necessary to finance the construction of the Kettle Falls project." (T. of R. p. 231)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general grounds." (T. of R. p. 231)

Specification of Error No. 72. The Court erred in sustaining the objection of appellee to Offer of Proof No. 78 by a qualified witness:

> "that he is president of The Washington Water Power Company, was such president on December 1, 1939, and has been at all times since; that on December 31, 1939, The Washington Water Power Company had b o o k assets of $76,235,798.39;

> that it had a surplus of $4,775,246.79; that it had a bonded indebtedness of $22,000,000; that it had refinanced its bonded indebtedness in June, 1939, and had issued and sold $22,000,000 of first mortgage bonds bearing three and a half percent interest." (T. of R. p. 231)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground and on the special ground that the financial standing of the company at the time the declaration was taken would have no tendency to establish the fair market value of the property that is being condemned." (T. of R. p. 232)

Specification of Error No. 73. The Court erred in sustaining the objection of appellee to Offer of Proof No. 79 by a qualified witness:

> "that The Washington Water Power Company is a public utility company organized and existing under the laws of the State of Washington; that the company has total book assets of $76,235,798.39 as of December 31, 1939; that it had a surplus of $4,775,246.79; that it had a bonded indebtedness of $22,000,000; that it had refinanced its bonded indebtedness in June, 1939, and had issued and sold $22,000,000 of first mortgage bonds bearing three percent interest; that as of December 9, 1939; The Washington Water Power Company was engaged in the production and distribution and sale of electric energy in the territory of eastern Washington and northern Idaho; that the property of Kettle Falls was held by the company as part of its total electrical system for use and development as a hydro-electric project as soon as the needs and demands of the company required its construction." (T. of R. p. 232)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground." (T. of R. p. 233)

Specification of Error No. 74. The Court erred in sustaining the objection of appellee to Offer of Proof No. 80 by means of the official records and reports of the Federal Power Commission:

> "That the Federal Power Commission has granted many licenses for the development of hydro-electric power plants upon navigable streams; that among the principal ones so granted are the following: Henry Ford & Son (Inc.), Hudson River; Alabama Power Co., Coosa River; South Carolina Pub. Ser. Authority, Santee and Cooper Rivers; Louisville Gas & Electric Co., Ohio River; Minnesota Power & Light Co., Mississippi River; Alabama Power Co., Tallapoosa River; Ford Motor Company, Mississippi River; Susquehanna Power Co. & Philadelphia Electric Co., Susquehanna River; Lexington Water Power Co., Saluda River; Puget Sound Power & Light, Columbia River; Safe Harbor Water Power Co., Susquehanna River." (T. of R. p. 233)

Appellee's counsel objected to the foregoing offer of proof as follows:

> "Objected to on the general ground." (T. of R. p. 234)

Specification of Error No. 75. The Court erred in sustaining the objection of appellee to Offers of Proof Nos. 81, 82, 83, 84 and 85 by qualified witnesses, said offers of proof being similar and the substance of each thereof being:

> "that all feasible power sites upon navigable rivers have in their natural state an enhanced market value due to the knowledge which is generally prevalent among customers for feasible power sites; that the Federal Power Commission will in all probability grant a license to an applicant financially capable of developing said site, and that such reasonable probability of such license being granted by the Federal Power Commission increases the market value of said property over and above its value for agricultural purposes." (T. of R. pp. 234, 235, 236, 237)

Appellee's counsel objected to the foregoing offers of proof as follows:

> "Objected to upon the same general ground." (T. of R. pp. 234, 235, 236, 237, 238)

Specification of Error No. 76. The Court erred in sustaining the objection of appellee to Offer of Proof No. 86 (T. of R. p. 238) consisting of defendants' Identification No. 3 (T. of R. p. 271) being a copy of the letter from the Executive Secretary of the Federal Power Commission to the President of The Washington Water Power Company stating that there appeared to be no complications which would prevent the issuance of a license for the development of the Kettle Falls Project, said copy of said letter having then and there been one of the documents covered by the stipulation relative to the admission of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy.

Appellee's counsel objected to the foregoing offer of proof as follows:

"The offer is objected to upon the general ground." (T. of R. p. 239)

Specification of Error No. 77. The Court erred in sustaining the objection of appellee to Offer of Proof No. 87 (T. of R. p. 239) consisting of defendants' Identification No. 4 (T. of R. p. 273) being a copy of a letter from the Executive Secretary of the Federal Power Commission, which letter informed the President of The Washington Water Power Company that he was correct in assuming that the Commission would issue a license for the project prior to the time when The Washington Water Power Company did obtain title or flowage rights over the land to be affected by the proposed development; said copy of said letter having then and there been one of the documents covered by the stipulation relative to the admission of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy.

Appellee's counsel objected to the foregoing offer of proof as follows:

"The offer of proof is objected to upon the general grounds." (T. of R. p. 239)

Specification of Error No. 78. The Court erred in sustaining the objection of appellee to Offer of Proof No. 88 (T. of R. p. 240) consisting of defendants' Identification No. 5 (T. of R. p. 274) being a copy of the Application for a Permit to Appropriate the Public Waters of the State of Washington, said copy of said Application having then and there been one of the documents covered by the stipulation relative to the admis-

sion of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy.

Appellee's counsel objected to the foregoing offer of proof as follows:

> "The offer is objected to upon the general ground." (T. of R. p. 240)

Specification of Error No. 79. The Court erred in sustaining the objection of appellee to Offer of Proof No. 89 (T. of R. p. 240) consisting of defendants' Identification No. 6 (T. of R. p. 279) being a copy of an Application for a Permit to Construct a Reservoir and to store for Beneficial Use the Unappropriated Waters of the State of Washington, said copy of said Application having then and there been one of the documents covered by the stipulation relative to the admission of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy. Appellee's counsel objected to the foregoing offer of proof as follows:

> "The offer is objected to upon the general ground." (T. of R. p. 241)

Specification of Error No. 80. The Court erred in sustaining the objection of appellee to Offer of Proof No. 90 (T. of R. p. 241) consisting of defendants' Identification No. 7 (T. of R. p. 281) being a copy of a letter from the State of Washington, Department of Conservation and Development, Division of Hydraulics, Olym-

pia, from Charles J. Bartholet, Supervisor of Hydraulics, to The Washington Water Power Company advising that on July 17, 1934, permits to appropriate and store waters of the Columbia River were issued to the Columbia Basin Commission for the development of the project at Grand Coulee, and notifying The Washington Water Power Company that its applications to appropriate and store waters at Kettle Falls would be kept in good standing until steps were taken to construct the dam at Grand Coulee to the full height, or an elevation of 1300 feet approximately, U. S. datum, said copy of said letter having then and there been one of the documents covered by the stipulation relative to the admission of evidence, which stipulation provided that said document should be admissible in evidence subject only to objections upon the ground of materiality or relevancy.

Appellee's counsel objected to the foregoing offer of proof as follows:

> "The offer is objected to upon the general ground." (T. of R. p. 241)

SUMMARY OF THE ARGUMENT

Briefly summarized appellants' contention is this:

That it was the owner of a certain tract of land on the Columbia River which it bought at the price of $150,000.00 for the purpose of developing into a power site and upon which it has spent several hundred thousand dollars in preliminary development work; that the government condemned the property for Federal public purposes and it is, therefore, obligated to pay the Company just compensation under the 5th Amendment; that the value of the property is to be measured by its market value for the most profitable use it is likely that it can be devoted to in the reasonably near future; that this is true even though said use requires that the property be combined with other property or rights if the likelihood that such combination can be effected is great enough to enhance the market value; that the government c a n n o t deprive the owner of this value just because one of the constituents of the combination happens to be government property; that it was therefore error not to permit the Company to prove, as it offered to do, that the property had an established and recognized value for power site purposes; that the site had been sought after for many years by private industry and was now held by the Power Company for development purposes; that application was pending for a license to develop it; and that but for the taking by the government it would in all probability have been so developed; that to limit the award for these barren rocks to agricultural, timber or other purposes and to pay less than $8,000.00

therefor, is to confiscate the defendant's property in plain violation of the 5th Amendment.

ARGUMENT

We regret the number of specifications of error it was necessary to burden the court with in this case but under the rules of this court it appeared to be advisable to specify as error the rejection of each offer of proof, but we see no reason why they can not all be argued together. The only question between the government and the Power Company is, did the trial court err in refusing to permit the introduction of *any* evidence of power site value in relation to the land involved, and, since its value for all other purposes was agreed upon, in directing a verdict for that amount. If this court holds that any of the evidence offered should properly be submitted to the jury, the case should be reversed and the scope and extent of the evidence properly admissible to prove power site values can be left to the determination of the district court upon a retrial. If, however, the court should feel called upon to pass upon the individual offers of proof the record shows that only as to offers Nos. 33, 34, 40, 50, 54, 60, 65, 74, were objections sustained on any other grounds than the ground of the general objection made to all the offers, and these we will discuss briefly at the close of the argument.

There are a few fundamental principles and distinctions which we believe must be kept in mind at all times in the consideration of this case.

First of all, this is an out and out condemnation or "taking" case, as distinguished from a cause of action for damages where the government's action has resulted in injury to the defendant's property without actually taking it.

Secondly, it is conceded that the government has the right to take this property and consequently the use for which it is taking it is of no materiality.

These principles are of importance here because it is the settled law that the United States may in the exercise of its right to improve navigation do many things which may cause a loss to a land owner or other individual and yet, if the act of the government does not amount to a "taking" of the property, the injury is damnum absque injuria and the 5th Amendment provides no protection.

Typical of these cases is Gibson v. United States, 166 U. S. 269, 41 L. ed. 996. In that case the claimant owned a valuable farm on an island in the Ohio River. One side constituted a landing which was used in shipping products from and supplies to his farm. The government in the exercise of its right to improve navigation built a dike on the river which substantially destroyed the landing of the claimant by preventing free egress and ingress to and from the landing. The court held that the United States was not liable for any damages, saying:

> "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various

states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution. 166 U. S. 269, 271, 272, 41 L. ed. 996, 1000, 17 S. Ct. Rep. 578."

Other cases announcing this principle are:

Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 S. Ct. 48;

Union Bridge Co. v. U. S., 204 U. S. 364, 51 L. ed. 523, 27 S. Ct. Rep. 367;

Willink v. U. S., 240 U. S. 572, 60 L. ed. 808, 36 S. Ct. 422.

Equally true on the other hand is the proposition that when property is taken just compensation must be made and the purposes for which the property is taken is wholly immaterial.

In Monongahela Navigation Co. v. U. S., 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622, the government brought condemnation proceedings to acquire the property of the Navigation Company consisting of its franchise and locks, canals, etc., some of which at least were in the bed of a navigable river. The court held that the fact the taking was for the improvement of navigation was immaterial; just compensation must be made, saying:

"* * * Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post-offices and post roads; but if Congress wishes to

take private property upon which to build a post-office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. * * * *Whatever be the true value of that which it takes from the individual owner, must be paid to him before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a postoffice is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the state, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken.* So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation. * * *'' 148 U. S. 312, 336, 337, 37 L. ed. 463, 471, 472, 13 S. Ct. Rep. 622. (Emphasis supplied)

The same principle is announced in:

U. S. v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 S. Ct. 349;

U. S. v. Cress, 243 U. S. 316, 61 L. ed. 746, 37 S. Ct. 380;

Olson v. U. S., 292 U. S. 246, 78 L. ed. 1236, 54 S. Ct. 704;

Reagan v. Farmers Loan T. Co., 154 U. S. 362, 38 L. ed. 1014, 14 S. Ct. 1047.

Here the government by this proceeding took the absolute fee simple title of this land from the Power Company, whom it is conceded held that title, and transferred it to itself in accordance with the provisions of Sec. 258a Title 40 U. S. C. and thereby made itself liable to the rule that "no private property shall be appropriated to public use unless a full and exact equivalent for it be returned to the owner." Monongahela Navigation Co. v. U. S., 148 U. S. 312, at 326, 37 L. ed. 463, 13 S. Ct. 622.

The issue then resolves itself into a determination of what is a "full and exact equivalent," measured in dollars. Of course, such exact equivalent is to be determined wholly disregarding any effect which the building of the Grand Coulee Project might have. The rule is aptly stated in Nichols on Eminent Domain (2d Ed.) Sec. 221, pages 675, 676, as follows:

> "Sec. 221. Appreciation in Value from the Improvement Itself.
>
> "It rarely happens that proceedings for the condemnation of land for the public use are instituted without months, years, and, in some instances, centuries of time spent in preliminary discussion and in the making of tentative plans. These discussions and plans are usually known to the owners and other persons interested in land in the vicinity of the proposed improvement, and are matters of common talk in the neighborhood. If the projected public work will be injurious to the neighborhood through which it will pass, the fact that it is hanging like the sword of Damocles over the heads of the land owners in the vicinity cannot but fail to have a depressing effect upon values, and on the other hand if it is expected that the improve-

ment will be of such a character as to benefit the surrounding land, values usually rise in anticipation of the construction of the improvement. When the taking is finally made, the question arises whether this anticipatory modification of values should be considered in awarding damages.

"If it is known from the very first exactly where the improvement will be located if it is constructed at all, the property that will be required for its site will not participate in the rise or fall in values, for since such property is bound to be taken if the improvement is constructed, it can never by any possibility either suffer from or enjoy the effects of the maintenance of the public work in its neighborhood; and consequently it is well settled that in such case in valuing the land the effect of the proposed improvement upon the neighborhood must be ignored. * * *"

"* * * To allow a public agency to depress market values in a particular neighborhood by threatening to erect an offensive structure in its midst, and then to take advantage of this depression in paying for the land required for the structure would be so abhorrent to the public sense of justice that it has never been seriously argued that it could be done; * * *"

Lewis on Eminent Domain (3d Ed.) Sec. 745, pages 1329, 1330, states the proposition thus:

"Sec. 745. Enhancement Caused by the Work or Improvement.

"* * * If the proposed improvement had depreciated the value of the property, it would be very unjust that the condemning party should get it at its depreciated value, and the correct rule would seem to be that the value should be estimated irrespective of any effect produced by the proposed work. * * *"

Here of course the place where the Grand Coulee

Dam would be built, if it was built, was known for years in advance. We make no claim for any value whatever that our land might have gained as part of, or in any way connected with the Grand Coulee project. Likewise, it has lost no value because of the building of the Grand Coulee Dam. To hold otherwise would be to hold that all the land in the reservoir became valueless when it is was decided to build the project, as no one would purchase a piece of land which was shortly to become the bottom of a lake forever.

What, then, is the measure of just compensation?

There are a world of state and federal decisions on this question but we shall content ourselves with calling the court's attention to only a few, as the courts generally are in agreement on the rules. It is only the application of them to this particular situation that presents difficulty.

An early case, but one closely analogous on its facts, is Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 5 S. W. 792. This was a condemnation case in which the railway company sought to acquire some land known as the "Point of Rocks" on the Arkansas River near Little Rock for use as a site for a bridge across the river. The river was a navigable stream and a bridge could only be built across it under a permit from the Secretary of War. The owner of the property had no such permit and the only issue was the value of the property. The court permitted testimony of its market value for bridge site purposes and the jury returned a verdict of $20,000 which the Supreme Court

affirmed. In discussing what just compensation is, the court said:

> "What is the measure of compensation which the citizen is entitled to demand for his property when thus taken? We think the general concurrence of authority is that the true measure is the market value of the property. Mr. Cooley says: 'The principle upon which the damages are to be assessed is always an important consideration in these cases; and the circumstances of different appropriations are sometimes so peculiar that it has been found somewhat difficult to establish a rule that shall always be just and equitable. If the whole of a man's estate is taken, there can generally be little difficulty in fixing upon the measure of compensation; for it is apparent that, in such cases, he ought to have the whole market value of his premises, and he cannot reasonably demand more. The question is reduced to one of market value, to be determined upon the testimony of those who have knowledge upon that subject, or whose business or experience entitles their opinions to weight.' Cooley, Const. Lim. 565.
>
> "In Boom Co. v. Patterson, 98 U. S. 403, the court say: 'The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted.'
>
> "A frequent source of confusion in cases of condemnation is that property sometimes seems to have a value other than and different from its market value. Bouvier, in his definition of 'value,' says: 'This term has two different meanings. It sometimes expresses the utility of an object, and sometimes the power of purchasing other goods with it. The first may be called the value in use, the latter value in exchange.' Webster recognizes a difference between 'intrinsic' and 'exchangeable' value. Webst. Dict. 'Value.' We also read in the

law-books of the *pretium affectionis* which sometimes attaches to property, and is recognized by the courts. This theory that property may have more than one value does not go, however, without dispute. Judge Lumpkin, in Harrison v. Young, 9 Ga. 359, says that 'the value of land, or anything else is the price it will bring in the market.' Whether this theory of different values is well or ill founded, we think that everyone who has had experience in trying condemnation cases will corroborate us in saying that such an idea obtains to a great extent among those who are called to testify as to the value of property.

"* * * Since, then, the market value is the criterion of damages, we are led to inquire, what is the market value? The word 'market' conveys the idea of selling, and the market value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay. The owner, in parting with his property to the state, is entitled to receive just such an amount as he could obtain if he were to go upon the market and offer the property for sale. To give him more than this would be to give him more than the market value, and to give him less would not be full compensation. Of course, real estate is not like cotton, grain, and other commercial products. It cannot be sold upon an hour's notice. To sell land at its market value sometimes requires effort and negotiation for some weeks, or even for some months. And, when we say that the owner is entitled to receive the price for which he could sell the property, we do not mean the price he would realize at a forced sale upon short notice, but the price that he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property. Yet it must be the amount which could have been obtained for the property with reference to the market value

at the time of its appropriation. One who anticipates an increase in the value of his property may feel it a hardship to surrender it without receiving more than its present market value; but it would be a hopeless task to either measure or satisfy the anticipations of a sanguine land-owner. If the market value is the price for which the property could be sold on the market, we are next led to inquire, how is the market value to be proven? This is usually done by calling witnesses who are familiar with the property, and asking their opinion as to such value. Here is one of the recognized exceptions to the general rule that witnesses are to state facts, and not to express opinions. When the witness has made his estimate as to the market value of the property, it is competent to support his estimate by having him describe the property, giving its location, advantages, and surroundings, though ordinarily this would be uncalled for unless his estimate was attacked on his cross-examination; in which case the party introducing him would have ample opportunity to rebut any facts which might appear to be derogatory to his estimate. How much latitude should be allowed the parties in the way of bringing out in the testimony collateral, or perhaps, we should say, cumulative, facts, to support, the estimates made by witnesses, is a matter that must be left very largely to the discretion of the presiding judge.

"* * * As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the land-owner should be allowed to state, and have his witnesses to state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual. On the other hand, the jury, and the opposing counsel for the information of the jury, should be allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to

make. This is only another way of stating the rule laid down as follows in Boom Co. v. Patterson, supra: '*In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties.*'

"Taking this rule as a line of departure, we proceed to determine the point—We may say the only point—which counsel have made the subject of controversy in their briefs; that is to say, whether it was competent for appellees to adduce evidence to show the value and advantages which the Point of Rocks possessed as a bridge-site. The counsel for appellant contends that the fact that the Point of Rocks constitutes an eligible bridge-site is not properly admissible as an element of value in this case. But, inasmuch as the counsel each accuse the other of misstating his contention, it will perhaps be safest to allow the counsel for appellant to state his position in his own way. We accordingly quote from his brief as follows: 'We contend that, having a special right under the laws of Arkansas to construct the road which we have constructed, and of erecting said bridge, *and the defendants not having shown any such, or similar right, that the defendants cannot have damages based upon a use to which they could not have put the property, but only for being deprived of the right to devote the property to such uses as the law allows them to devote it to.*' '*If Woodruff did not have the right to bridge the Arkansas, he has not been deprived of anything but his land.*' *This is asking us to put fetters on the market value, if it is not a proposition to discard it as a criterion of damages altogether.* It can hardly be doubted that, if Woodruff had gone upon the market to sell this property, he would not have concealed the fact that it possessed superior advantages as a bridge-site. Now, if he would not have concealed it from a purchaser, it would be unfair to him for the court to conceal it from the jury. On the other hand, if

one had been about to purchase this property, he would hardly have been so obtuse as to overlook an element of value so obvious as its eligibility for a bridge-site. Railroad and bridge companies do not condemn all the land they make use of in their location. The amount they obtain in this way constitutes, perhaps, a small per cent of what they utilize. They are frequently in the market as purchasers, and they are sometimes in a position to dictate very favorable terms. We think the probable demand that there may be for suburban land for depot and bridge-sites is a recognized factor in the market value of property in some cases. *All that lends value to anything that we possess is the fact that other people want it, and are willing to pay the m o n e y to get it. If it were announced that a point of rocks on the Mississippi river at Hopefield, opposite Memphis, was offered for sale upon the market, it is easy to predict that there would be no lack of bidders, and that the price offered would be very much above what the property would be 'worth as a piece of land.' In their anxiety to secure property so valuable, bidders would hardly delay until they had obtained authority to build a bridge."* 5 S. W. 792, 793, 794, 795. (Emphasis supplied)

We think the analogy of this case is particularly apt because it disposes of the contention which the government so strongly relies on here, namely, if the Power Company had no right to build the dam and power house it has not been deprived of anything but its land. The answer to the appellee's argument, as pointed out so ably by the court, is that such a ruling would put fetters on the market value, because even though the owner lacks the legal right to build a dam, still, if his land would command a higher price in the market than land unsuited for dam purposes, he is entitled to such

value when his land is taken from him by condemnation.

The Arkansas Court placed much reliance on the case of Mississippi and Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206. This also was a condemnation suit brought by the Boom Company to acquire title to some islands belonging to Patterson in the Mississippi River. The sole issue was whether the islands had a special value for boom purposes or only value for agricultural purposes. The jury fixed their value at $300 for all purposes other than boom purposes and $9,358.33 for boom purposes. The Mississippi is a navigable river and Patterson had no authority or license to put a boom across it, and the Boom Company did and contended therefore, the islands had no value to Patterson for boom purposes. The court said:

> "* * * In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.
>
> "So many and varied are the circumstances to be taken into account in determining the value of

property condemned for public purposes, that it is, perhaps, impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

"The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The Boom Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom p u r p o s e s was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands.

"* * * Aside from this, we do not think that the State is precluded by anything in the charter of the Company from giving a license to the defendant in error to construct a boom near his lands. Moreover, the United States, having paramount control over the river, may grant such license if the State should refuse one. The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands condemned. The contention on the part of the plaintiff in error is, that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons, by reason of its supposed exclusive privileges; in other words, that by the grant of exclusive privileges to the Company the owner is deprived of the value which the lands,

> by their adaptability for boom purposes, previously possessed, and therefore should not now receive anything from the Company on account of such adaptability upon a condemnation of the lands. We do not think that the owner, by the charter of the Company, lost this element of value in his property. * * *'' 98 U. S. 403, 407, 408, 409, 25 L. ed. 206, 208, 209.

To the same effect see also Simpson v. Shepard, 230 U. S. 451, Ann. Cas. 1916A, 18, 48 L. R. A. (N. S.) 1151, 57 L. ed. 1563, 33 S. Ct. 729, considering availability for railroad purposes; United States v. Chandler-Dunbar Water Power Co., 229 U. S. 77, 57 L. ed. 1081, 33 S. Ct. 667, considering availability for public purpose of land appropriated for canal and lock purposes; In re Ashokan Dam, 190 Fed. 414; Brack v. Mayor, etc. of Baltimore, 125 Md. 382, 384, 93 Atl. 995, 996, considering availability for reservoir purposes; San Diego Land etc. Co. v. Neale, 78 Cal. 69, 3 L. R. A. 86, 20 Pac. 375, allowing value of property for reservoir purposes; Seattle etc. Ry. Co. v. Murphine, 4 Wash. 457, 30 Pac. 722, admitting evidence of its value for any use for which adapted. (Rose's Notes on United States Reports, Vol. 10, pp. 579, 580)

The case of Olson v. United States, 292 U. S. 246, 78 L. ed. 1236, 54 S. Ct. 704, is very helpful in the solution of this problem. It was a condemnation suit brought by the United States to acquire title to lands bordering on the Lake of the Woods in Minnesota which were going to be inundated by the impounded waters from a dam built in Canada under a treaty whereby the United States was to acquire the overflow rights on the American side of the lake. Olson owned

55 acres of land below the overflow contour and claimed damages on the theory his land was valuable as part of the reservoir. The court did not decide as a matter of law that since Olson's land was on a navigable body of water, and since the outlet was in Canada, he had no legal right to create a reservoir and had, therefore, lost nothing; but after considering the evidence at great length held that all the facts surrounding the situation were such that the land had no market value for reservoir purposes and that the owner could not claim as damages any part of the value which the lands had to the government as a reservoir site.

> "That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. * * *
>
> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 408, 25 L. ed. 206, 208; Clark's Ferry Bridge Co. v. Public Serv. Commission, 291 U. S. 227, ante, 767, 54 S. Ct. 427, 2 Lewis, Em. Dom. 3d ed. Sec. 707, p. 1233; 1 Nichols, Em. Dom. 2d ed. Sec. 220, p. 671. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility

> of combination is reasonably sufficient to affect the market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. New York v. Sage, 239 U. S. 57, 61, 60 L. ed. 143, 146, 36 S. Ct. 25. It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account. Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206, ubi supra. * * *'' 292 U. S. 246, 255, 256, 78 L. ed. 1236, 1244, 1245, 54 S. Ct. 704.

This expresses exactly appellant's contention. In order to complete a hydro-electric development, appellant's property, a damsite, had to be combined with the necessary overflow easements and with the permission of the government to erect the structure and to use the water of the river; but in the language of Justice Butler (supra) such combination may be considered in ascertaining value "if the possibility of combination is reasonably sufficient to affect the market value."

The court goes on then to point out the type of enhanced value the owner is not entitled to.

> "* * * *But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking. Considerations that may not reasonably be held to affect market value are excluded. Value to the taker of a piece of land*

*combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled. * * *"* 292 U. S. 246, 256, 78 L. ed. 1236, 1245, 54 S. Ct. 704. (Emphasis supplied)

We do not ask consideration for any such value here. We claim no part of the value of this land as part of the Grand Coulee Project. The market value we claim is based upon the assumption that the Coulee Dam had never even been thought of, much less built.

The court then continues:

"Flowage easements upon these lands were not currently bought or sold to such an extent as to establish prevailing prices, at or as of the time of the expropriation. As that measure (United States v. New River Collieries Co., 262 U. S. 341, 344, 67 L. ed. 1014, 1017, 43 S. Ct. 565) is lacking, the market value must be estimated. In respect of each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 124, 68 L. ed. 934, 941, 44 S. Ct. 471. The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof. Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that

> would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth. * * *'' 292 U. S. 246, 257, 78 L. ed. 1236, 1245, 1246, 54 S. Ct. 704.

In line with the reasoning of the Olson case, the courts hold that a land owner is entitled to any value which his land has because of the chance or likelihood that it can or will be devoted to some special use. For example: The Supreme Judicial Court of Massachusetts expresses the rule in two leading cases as follows:

In Moulton v. Newburyport Water Co., 137 Mass. 163, the question involved the value land might have for water reservoir purposes. The court said:

> ''* * * The petitioners were not entitled to swell the damages beyond the actual fair market value of the land at the time, by any consideration of the chance or probability that, in the future, authority might be acquired, by legislation or purchase, to carry the water in pipes to neighboring towns. *Such chance or probability must needs enter to some extent into the market value itself; and, so far as the market value might be enhanced thereby, the petitioners were entitled to the full benefit of it.* If there were different customers who were ready to give more for the land on account of this chance, or if there were any other circumstances affecting the price which it would bring upon a fair sale in the market, these elements would necessarily be considered by the jury, or by a witness, in forming an opinion of the market value. * * *'' 137 Mass. 163, 167. (Emphasis supplied)

And in Sargent v. Merrimac, 196 Mass. 171, 81 N. E. 970, the same court reaffirmed this principle, saying:

> "* * * The market value to which the petitioner was entitled was made up of the value of the land apart from its special adaptability for water supply purposes, plus such sum as a purchaser would have added to that value because of the chance that the land in question might be some day used as a water supply. Moulton v. Newburyport Water Co., 137 Mass. 163. * * *" (196 Mass. 171, 81 N. E. 970, 971)

In Ford Hydro-Electric Co. v. Neely, 13 Fed. (2d) 361 (C. C. A. 7) the court holds squarely that:

> "* * * The availability of the land for the development of water power, and the value of it for such purposes, was a proper element to be considered by the jury in fixing its market value. * * *" (13 Fed. (2d) 361, 362)

And so:

> "* * * This being an element proper to be considered, it could not be excluded, but plaintiff in error could have asked the court to instruct the jury that they should take into consideration the probability or practicability of so uniting all the lands as to make the water power appertaining to the lands of defendants in error available." (13 Fed. (2d) 361, 362)

In practically every power site case there is the question of the owner's ability to combine his property with that of others to make a complete project. The question of the likelihood of such combination or the reasonableness of it, is for the jury unless the situation is such as the Olson case or the Continental Land case, that the court can hold as a matter of law that the evidence is conclusive that no such probability exists.

> Andrews v. Cox, 17 Atl. (2d) 507;
> Brown v. Forest Water Co., 62 Atl. 1078;

Marine Coal Co. v. Pittsburgh, M. & Y. R. Co., 92 Atl. 688;

Union Electric Light & Power Co. v. Snyder Estate, 65 Fed. (2d) 297.

Appellant here contends it was entitled to have submitted to the jury all the facts which in all probability would have been considered by a willing seller and a willing buyer. We believe to hold that a willing seller and a willing buyer would not consider the prior sales of this property, its physical adaptability for a power development, and the likelihood or probability that the necessary consents for a development could have been obtained is to utterly disregard the rule above referred to as well as the realities of the situation. We believe further that to deny us the right to offer any such evidence, denies us the right to just compensation guaranteed by the 5th Amendment.

The trial judge, however, felt that regardless of the general principles enunciated by the Supreme Court, that he was bound by the ruling of this Court in the case of Continental Land Co. v. United States, 88 Fed. (2d) 104 (C. C. A. 9), which he felt could not be distinguished from the case at bar. In this regard he said:

> "I am forced to the conclusion that there is no real distinction between the facts of this case and the facts of the Continental case. Therefore, despite my determination to permit the introduction of this testimony if a way could be found to justify it, I am now convinced that it would be of service to no one to take the time or to expend the money necessary to permit the introduction of defendant's proposed testimony. It may well be that the Circuit Court will decide that on the basis

> of the different facts of this case it will make a different ruling from that in the Continental case. Until then, I am bound by that decision." (T. of R. p. 132)

We sincerely believe that not only is the Continental Land Company case distinguishable from the case at bar, but that when properly interpreted, it is an authority for the appellant's contention.

The facts of the Continental Land Company case are as follows: The lands on either side of the Columbia River where the Grand Coulee Dam now stands were owned on December 27, 1933, by The Continental Land Company, Samuel J. Seaton, Julius C. Johnson, and William Rath's estate. The land itself was semi-arid, uncultivated, suitable only for grazing, but contained a granite wall or dike extending under and across the river, at which point a tremendous dam, the largest structure ever built by man, could be built. From this dam an area of 1,243,000 acres could be irrigated, 2,646,000 horsepower developed. "The cost of putting in the foundation before any head is secured for power development purposes is about $60,000,000. The completed structure will cost $197,000,000!" (88 Fed. (2d) 106)

At the trial the government called qualified witnesses who testified that leaving out of consideration any value for the government project and taking into consideration every other possible use or value, the value was a few thousand dollars for each tract, that none of the lands had any value for dam site or reservoir purposes. Engineers of the Reclamation service,

including F. H. Banks, Supervising Engineer, testified that the site would have no value to anyone except the government; that the investment and the carrying charge during the development period would be too great for private investment. (88 Fed. (2d) 106)

The defendants called several hydro-electric engineers as expert witnesses who figured the cost of a dam, the amount of power which could be developed, the market for power, the probable profits from the sale of this power, and then gave opinions as to what the site would be worth. These values ranged from $2,300,000 to $4,500,000! At the close of the defendant's case the judge granted a motion to strike all of the defendant's evidence of power site value, because as he said, "That the land owner so owning these adjoining shore lands is not entitled to have any allowance made to him based upon any title to the bed of the stream or any allowance made to him for any right that he has because of the water running in the navigable stream or its potential water power." (88 Fed. (2) 108)

The decision on appeal by this court affirming the district court is deserving of the most careful scrutiny. The case was heard by Garrecht and Haney, Circuit Judges, and Neterer, District Judge, and the opinion written by Judge Neterer. The court first fully analyzes the statutes authorizing the building of the Grand Coulee Dam, sets forth the facts showing the tremendous magnitude and cost of the undertaking, points out the testimony of the government engineers that such a project could not be developed by private capi-

tal. The opinion then proceeds to analyze the testimony of the defendant's witnesses, again emphasizing the magnitude of the project and the testimony on cross examination that private capital was not and never had been interested in acquiring this land for power site purposes.

> "Some of these witnesses on cross-examination stated they did not know why private capital did not purchase these lands and had not sufficient knowledge to answer the question as to why the property was not purchased in 1929. Others testified that there is no market for such dam site purposes, and 'that the discussion about the Grand Coulee project during recent years has been a discussion with reference to the attempt to get the Government interested in building that project and there never has been any private enterprise contemplated. * * * in all that time for development of the project.' There was no market for a dam site of such size as this location. Another witness testified that none of the lands had a market value for a dam site or reservoir in 1933."
>
> "* * *
>
> "'I do not know of any large sales of damsite property at that location or anywhere else in that vicinity at that time, or at any time near that date. There was some purchase of property by the Niagara-Hudson Power Company for the St. Lawrence development during that period. Just exactly what dates I don't know. That is adjacent to a thickly populated country. I do not know of any such sales anywhere in the Northwest. No very large projects were constructed to my knowledge during the period of the depression. There were no hydro-electric developments started in the Northwest during the period between 1930 and 1934. There was no need for them at that time. During that time nobody would have financed such

> construction. Financing construction requiring $70,000,000.00 would be found very improbable. It would be foolish to construct a development where there was no necessity for power at that particular date, December, 1933 * * *.' " 88 Fed. (2d) 104, 107.

What was the purpose of so carefully summarizing all of this testimony? The answer would seem to be obvious; it was to show that the Grand Coulee Project was so gigantic that only the government could build it; that therefore the lands had no increased market value for power purposes other than their value to the taker, the government, and that the owners could claim no *additional hypothetical value* based upon the inherent value of the water power in the river; first, because they had no ownership to such water power and, second, because the likelihood of their lands being used for power-site purposes by anyone other than the condemnor was so remote that it had not enhanced the market value of these lands one dollar over their value for agricultural or grazing purposes and so should not be considered by the jury.

If, on the other hand, the court intended to say, as the government contends, that no land adjacent to a navigable stream can have value for power site purposes no matter how sought after by private capital, no matter what the prices bid and paid for such land on the open market, and no matter how likely the use of the lands for such purposes was, then three-fourths or more of the court's opinion was unnecessary, misleading, and mere dicta.

After setting up the evidence the court proceeds to

discuss the first proposition stated by Judge Webster (the trial judge) as follows:

> "* * * 'That the land owner so owning these adjoining shore lands is not entitled to have any allowance made to him based upon any title to the bed of the stream or any allowance made to him for any right that he has because of the water running in the navigable stream or its potential water power. * * *'
>
> "Again the court said: 'These owners, in my judgment, are not entitled to have that adaptability of this site taken into account for the reason they have neither title to the bed of the stream nor any right to the waters which flow in it as against the Government exercising dominant power to improve the stream for navigation purposes, and that they are not entitled to that because it has not been taken from them, and it hasn't been taken from them for the simple reason that they never owned it in the first place.'" 88 Fed. (2d) 104, 108, 109.

The opinion also states: "The court could well rest affirmance upon the statement of Judge Webster in striking from the jury's consideration the evidence relating to dam site value." 88 Fed. (2d) 104, 109. Under the facts of the Continental case we think this is correct. Judge Webster felt and rightly so, that the millions claimed were based upon a claim to the right to the "water running in the navigable stream or its potential water power." This they should not be compensated for because they did not own it and therefore had suffered no loss. Likewise, they did not own the bed of the river and no compensation was due them for that. There being no creditable evidence whatever that the uplands had any value on the market

above their agricultural value, the only value the two to four million dollars could relate to was the value of the power inherent in the fall of the water in the river. True, the experts attempted to relate their values to the market value of the uplands by stating that private capital was interested in these lands and would pay such higher prices for them, but this court disposed of that contention by saying, "The speculative theorizing of expert witnesses as to private capital's seeking this site for development is of no value." (88 Fed. (2d) at page 111)

We make no claim here to the value of the bed of the river or the value of the water power as such because we admit we own neither. All we claim is the market value of the Power Company's land, taking into consideration all uses to which such lands might reasonably be devoted in the reasonably near future, even if such use required the combination with property of others.

In discussing the first question, namely, whether the Continental Land Company had any right to the value of the water power, this court goes on to point out that the title to the bed of the Columbia River is in the State of Washington, which is not disputed; that Congress has the power to remove obstructions and forbid the use of the river or cut off the riparian owner from direct access to deep water, as in Scranton v. Wheeler, 179 U. S. 141, 21 S. Ct. 48, 45 L. ed. 126, heretofore cited as one of the non-taking cases. The court then cites United States v. Chandler-Dunbar Water Power

Company, 229 U. S. 53, 33 S. Ct. 667, 57 L. ed. 1063, as decisive of the case and quotes this portion of the case:

> "The government had dominion over the water power of the rapids and falls, and *cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use.* These additional values represent, therefore, no actual loss, and there would be no justice in paying for a loss suffered by no one in fact. '* * * The question is what has the owner lost, and not what has the taker gained.' " 229 U. S. 53, 76, 57 L. ed. 1063, 1080, 33 S. Ct. 667. (Emphasis supplied)

We will discuss the Chandler-Dunbar case more fully later in the brief, but let us examine this quotation here.

First it must be read in connection with this language used in the opinion (229 U. S. 53, 81, 57 L. ed. 1063, 1082) "The owner must be compensated for what is taken from him; but that is done when he is paid its fair market value for all available uses and purposes." What then is meant by the phrase, "any hypothetical additional value to a riparian owner"? Additional to what? Clearly additional to the fair market value which it is admitted must be paid. If it is *additional* to this value of course it is not part of it. What is meant by hypothetical? Webster's New International Dictionary defines it as "Characterized by, or of the nature of, a hypothesis; *assumed without proof,* for the purpose of reasoning and deducing proof, or of accounting for some fact." The Supreme Court explains the phrase thus in the Chandler-Dunbar decision:

> "These 'additional' values were based upon the erroneous hypothesis that that Company (Chandler-Dunbar Water Power Company) had a private property interest in the water power of the River, not possibly needed now or in the future for purposes of navigation and that that excess or surplus water was capable, by some extension of their works already in the river, of producing 6,500 horse power. * * *" 229 U. S. 53, 75, 76, 57 L. ed. 1063, 1080, 33 S. Ct. 667. [Words in parenthesis supplied.]

In other words, in addition to the recognized market value it was assumed without proof, that the riparian lands had a value equal to the value of the horse power which could be developed in the stream. This is exactly what was claimed in the Continental case, where the market value was a few thousand dollars. The hypothetical additional value was several million, being the assumed value of the horse power which could be developed in the Columbia River—but that claim of value was denied and properly, we think.

This court continuing in its decision, points out that the Continental Land Company seeks to escape the ruling in the Chandler-Dunbar case against "hypothetical additional" value by referring to the value of their land as its "inherent adaptability." Inherent adaptability carries with it the meaning that regardless of o t h e r factors, if the quality or characteristic of adaptability to power purposes exists in, or as is said, is "inherent" in a piece of property, that characteristic of itself possesses value which must be compensated for if taken by eminent domain. Of course, this is not so. Just as an example, there may exist in the wilds of Alaska a geological formation of rocks and a

river that from an engineer's point of view could be made into an ideal power plant, yet it would have no market or commercial value whatever. Likewise, here in Washington there existed land which could be made into a power site, yet because of the magnitude and cost of the project it had no market or commercial value. Both sites had "inherent adaptability" or "hypothetical additional value," but the owner of neither would be entitled to compensation for this supposed value. These phrases are used by Judge Neterer as synonymous in his opinion when he says on page 110:

> "No persuasive merit is impressed by argument that the court in this case [U. S. v. Chandler-Dunbar] was dealing with water power as a separate unit of property and inherent adaptability of the land ('hypothetical additional value') as here contended for was not considered." 88 Fed. (2d) 104, 110. [Words in brackets supplied.]

The court then goes on to close its opinion on this point with this language:

> "The claim of appellants has no substance, it has no possessory status; it is based upon something which is not possessed, and not being possessed, it has to appellants no value, and appellants lost nothing. The *question is,* what have *appellants lost, not what appellee gained.* Boston Chamber of Commerce v. Boston, 217 U. S. 189, 194, 30 S. Ct. 459, 54 L. ed. 725." 88 Fed. (2d) 104, 110.

Let us apply this test to the two cases. In the Continental Land Company case, what had the Land Company lost—nothing but its land. What had it paid for its land—nothing but a few thousand dollars. What could it have sold its land for—nothing but a few thou-

sand dollars. To what use could it put its land then or in a reasonable time in the future—only to an agricultural or grazing use. What did the court award it—the same few thousand dollars for which it could have sold it and which represented the value of the use to which it could be put. How then was it damaged? The answer of course is obvious; it was not, and the decision of the court was correct.

In this case, however, what has The Washington Water Power Company lost? Its land. What had it paid for its land? $150,000. What had it spent in improving its land for power generation purposes? About $350,000. What could it have sold its land for? In the neighborhood of $500,000. To what use could it put its land then or in a reasonable time in the future? It had the finances to build a hydro-electric plant; it had a $70,000,000 system ready to use the electrical energy generated; it had made arrangements to secure the necessary rights and additional lands; it had an application pending before the Federal Power Commission which would have been granted had not the government decided to build Grand Coulee and condemn its property. What did the Court award it? $7,950.35!! What has it lost? The difference between what it could have sold its property for at a free sale at the time of taking upon the market and what it has been given by the government at a forced sale,—in this case several hundred thousand dollars.

Naturally this court did not feel it could close the Continental Land Company case at this point as to do so would only have half disposed of the case. It would

only have held that riparian lands on a navigable stream, which are physically capable of being used for power purposes, i.e., possess ("inherent adaptability") hold no value on account of that fact alone, and that such lands because of the value of the water that flows by them have acquired no ("hypothetical additional value"). However it would have left open the question: Did the lands in fact have an enhanced market value because of the likelihood that they could be used for power purposes in the reasonably near future?

So the court proceeded to analyze the facts and to show that in the Continental Land Company case this element of value did not exist.

The court said:

> "It may also be said that the lands had no inherent value for the purposes claimed by the appellants, unless in probable combination with other lands, for private use. There is no evidence that there was any reasonable probability of combination in a *reasonably near future,* or at all, of these lands for private use. *No capital was seeking the lands for use.* When diversity of ownership is considered (900 private owners—600 parcels) government lands, state lands, Indian reservation land, Indian allotted land, withdrawal of reclamation lands, the full control of the United States of the water and river bed for navigation (see Olson v. United States, 292 U. S. 246, 54 S. Ct. 704, 78 L. ed. 1236), the capital required for investment and consideration of the testimony of conditions in districts to which capital did go and judicial knowledge of the congressional attitude with relation to such permission, and the requirements for the granting of such benefits; the population in the tributary territory, and other hydro-

> electric plants, Priest Rapids, Washington Power Company, including Chelan Falls and a number of other subsidiaries, Bonneville, City of Seattle Department of Lighting (Steam Plant and Skagit Project), Federal Power Commission Project No. 552, and Project No. 1215, Puget Sound Power & Light Company, including following plants: (Nooksacke Falls, Baker River, White River, Shuffleton Steam), Tacoma Railway, Light & Power (including Lake Cushman plant), Idaho Light & Power Company, in tributary territory of the Grand Coulee Dam. Greeson v. Imperial Irr. Dist. (C. C. A. 9) 59 F.(2d) 529, 530, at page 531; Muller v. Oregon, 208 U. S. 412, 28 S. Ct. 324, 52 L. ed. 551, 13 Ann. Cas. 957; The Apollon, 9 Wheat. (22 U. S.) 362, 6 L. ed. 111. There is not left the shadow of a doubt that there was no reasonable probability of utilizing this land by private capital. There was no offer of proof that this land was sought by private capital; that there was any movement to interest private capital. On the contrary, the testimony shows that all of the agitation had been for a government dam. The speculative theorizing of expert witnesses as to private capital's seeking this site for development is of no value. * * *'' 88 Fed. (2d) 104, 110, 111. (Part of emphasis supplied)

In other words, the court says there was no evidence these lands were sought for private use. It then takes judicial notice of facts that affirmatively show private capital would not be interested. These facts relate to the population of the territory tributary to Grand Coulee; the other available developments, which included Priest Rapids, a site in the same Columbia River, the sites of The Washington Water Power Company "including Chelan Falls and a number of other subsidiaries," chief of which, of course, is the Kettle Falls site, the identical property involved here,

which private capital would purchase and develop in preference to Grand Coulee. And so, says the court, there is left no "shadow of a doubt that there was no reasonable probability of utilizing this land by private capital."

But what happens in the case at bar? When we attempted to offer proof that private capital was ready to develop this site (a fact of which this court took judicial notice in the Continental case), the trial court held such evidence inadmissible!

Judge Neterer then goes on to cite the case of McCandless v. United States, 298 U. S. 342, 56 S. Ct. 764, 80 L. ed. 1205, as pointing the way.

That case involved no navigable stream, no improvement of navigation; it was just a condemnation suit to acquire 4080 acres of land in the island of Oahu for a federal public purpose. Yet, says Judge Neterer, it points the way for all condemnation suits, whether the land is being acquired in connection with the improvement of navigation or not.

The question in the McCandless case was whether the jury should consider the possibility of bringing water to the land and irrigating it, which would naturally increase its value. The court held such evidence admissible and stated the rule:

> "The rule is well settled that, in condemnation cases, the most profitable use to which the land can probably be put in the reasonably near future may be shown and considered as bearing upon the market value; and the fact that such use can be made only in connection with other lands does not

> necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value. Olson v. United States, 292 U. S. 246, 255, 256, 78 L. ed. 1236, 1244, 1245, 54 S. Ct. 704." 298 U. S. 342, 345, 80 L. ed. 1205, 1208, 56 S. Ct. 764.

This court concluded its opinion in the Continental Land Company case by commenting as follows on the holding in the McCandless case:

> "There is no such record here. No proof was produced, no offer was made, of any possibility reasonably near or remote or at any time that the land would be or could be so used. There is no error." 88 Fed. (2d) 104, 111.

In the case at bar appellants offered to prove all the things suggested as necessary. We offered to prove that these lands, as soon as they were released by the Government for sale, had always been bought and sold upon the basis of their power site values, at prices ranging from $80,000 to $150,000; that the appellant had paid $150,000 for the lands, and that it had spent nearly $350,000 in preparing the lands for power site development; that it had done everything required of it to secure all the necessary state and federal permission; that at the time its lands were taken it was ready, able and intending to devote them to power site uses.

The conclusion seems inescapable that the holding of the Continental Land Company case is this: That riparian lands on a navigable stream have no value because of their inherent adaptability for power site purposes, that they have no added value because there is water power in the stream that flows by them, but if there is

a possibility of combining them with the water in the river and the other lands necessary for a reservoir, and such possibility is one that is reasonably sufficient to affect the market value, the owner is entitled to such enhanced market value when his property is taken by eminent domain.

This conclusion is strengthened by a consideration of the case of United States v. Chandler-Dunbar Water Power Company, 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667.

That case was a condemnation proceeding brought by the United States against the power company under a special act of Congress. It involved the improvement of navigation in the St. Marys River at Sault Sainte Marie, Michigan. The St. Marys River is a navigable river which forms the International Boundary at this point and through which the traffic between Lake Superior and the other Great Lakes is carried. The Chandler-Dunbar Company owned various parcels of land along the river and had erected some wing dams and other structures in the river under revocable permits from the Secretary of War. The company claimed that in addition to the value of its lands and structures it was entitled to $3,450,000 for "the undeveloped water power of the river at St. Marys rapids in excess of the supposed requirements of navigation." The lower court allowed $550,000. Justice Lurton states the question as follows:

> "From the foregoing it will be seen that the controlling questions are, first, whether the Chandler-Dunbar Company has any private property in the

> water power capacity of the rapids and falls of the St. Marys river which has been 'taken,' and for which compensation must be made under the 5th Amendment to the Constitution; and, second, if so, what is the extent of its water power right and how shall the compensation be measured?" 229 U. S. 53, 60, 57 L. ed. 1063, 1074, 33 S. Ct. 667.

The court then analyzed this claim at length and pointed out that the ownership of riparian lands gives no ownership of the river; that Congress could, as it did, improve navigation and forever bar the erection of structures in the river and yet not "take" any property of the owner of adjacent land, and reaches this conclusion:

> "The conclusion, therefore, is that the court below erred in awarding $550,000, or any other sum, for the value of what is called 'raw water,' that is, the present money value of the rapids and falls to the Chandler-Dunbar Company as riparian owners of the shore and appurtenant submerged land." 229 U. S. 53, 74, 57 L. ed. 1063, 1080, 33 S. Ct. 667.
> "* * * "

Of course we have never claimed anything for "raw water." The multi-million dollar claim in the Continental Land Company case was in actuality for "raw water" no matter if it was disguised as "inherent adaptability" of the uplands.

Having disposed of this main claim, the court considered next the award for the uplands. The Company owned a narrow strip bordering on the river, having an area of something more than eight acres. The court allowed for this property:

> "a. For its value, including railroad side tracks,

buildings, and cable terminal, including also its use, 'wholly disconnected with power development or public improvement, that is to say, for all general purposes, like residences, or hotels, factory sites, disconnected with water power, etc., $20,000.' ''

''b. For use as factory site in connection with the development of 6,500 horse power, either as a single site or for several factories to use the surplus of 6,500 horse power not now used in the city, an additional value of $20,000.''

''c. For use for canal and lock purposes, an additional value of $25,000.'' 229 U. S. 53, 74, 57 L. ed. 1063, 1080, 33 S. Ct. 667.

To awards ''b'' and ''c'' the government objected.

The court held that the value in sub-division ''a'' was proper. Item ''b'' was discarded as an ''additional'' value, ''based upon the erroneous hypothesis that the company had a private interest in the water power of the river,'' but as to item ''c'' the court held it was proper, using this language:

''The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes *must be overruled.* That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. *Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to*

the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose. Lewis, Em. Dom. Sec. 707; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 408, 25 L. ed. 206, 208; Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 S. Ct. Rep. 361; Young v. Harrison, 17 Ga. 30; Alloway v. Nashville, 88 Tenn. 510, 8 L. R. A. 123, 13 S.W. 123; Sargent v. Merrimac, 196 Mass. 171, 11 L. R. A. (N. S.) 996, 124 Am. St. Rep. 528, 81 N. E. 970. Mississippi & R. Boom Co. v. Patterson was this: A boom company sought to condemn three small islands in the Mississippi river, so situated with reference to each other and the river bank as to be peculiarly adapted to form a boom a mile in length. The question in the case was whether their adaptability for that purpose gave the property a special value which might be considered. This court held that the adaptability of the land for the purposes of a boom was an element which should be considered in estimating the value of the lands condemned. The court said, touching the rule for estimating damages in such cases:

"'So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.'

"In Shoemaker v. United States, supra, lands were condemned for park purposes. In the court below the commissioners were instructed to estimate each piece of land at its market value, and that, 'the market value of the land includes its

> value for any use to which it may be put, and all the uses to which it is adapted, and not merely the condition in which it is at the present time, and the use to which it is now applied by the owner; . . . that is, by reason of its location, its surroundings, its natural advantages, its artificial improvement, or its intrinsic character, it is peculiarly adapted to some particular use,—e.g., to the use of a public park,—all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation.' The court approved this instruction." 229 U. S. 53, 76, 77, 78, 57 L. ed. 1063, 1081, 33 S. Ct. 667. [Emphasis supplied]

This award, we think, is of vital significance. The upland in the Chandler-Dunbar case could not of course be used for canal and lock purposes without making use of the water of the river. One cannot operate a canal and locks without water! Yet, the riparian owner had no legal right or ownership to the water of the navigable stream and the government could prevent its diversion if its chose. So the owner could not build and operate these canals and locks without government permission. Thus it might well be said that when the land was taken from him he *lost nothing* in not being paid for the value of his lock site, but the court did not so hold. On the contrary, it said, "That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative." In other words, if the use to which the property can be put, even though in combination with the water of a navigable stream, is real and imminent, so that the value of the land is affected

by it, it is a real value which belongs to the owner. There is no fundamental difference between diverting the water through a canal, running it through a lock and returning it to the river, and diverting it through a penstock, running it through a turbine and returning it to the river.

The portion of the Chandler-Dunbar case last hereinbefore quoted was cited with approval in the following cases:

—Brooks-Scanlon Corp. v. United States, 265 U. S. 126, 68 L. ed. 942, 44 S. Ct. 475, holding damages allowed for requisitioning by government of contract for ship partly constructed are amounts which probably could have been obtained for assignment of contract and all rights therein in fair negotiation between owner willing to sell and purchaser desiring to buy.

—United States v. New River Col. Co., 262 U. S. 344, 67 L. ed. 1017, 43 S. Ct. 567, holding compensation for export coal taken by government for war purposes is determined solely by market value of export coal at time taken.

—C. G. Blake Co. v. United States, 275 Fed. 866.

—National City Bank v. United States, 275 Fed. 860, holding just compensation for coffee requisitioned by United States is fair market value, and not cost plus five per cent.

—Emmons v. Utilities P. Co., 83 N. H. 186, 58 A. L. R. 794, 141 Atl. 68, holding riparian owner not precluded from proving market value of land for water power merely because such is being condemned for that purpose.

—Re New York City, 230 App. Div. 45, 243 N. Y. Supp. 68, holding exclusion in condemnation proceedings, of evidence concerning availability of res for apartment house sites is reversible error.

—Re Bronx Pkwy. Comm., 192 App. Div. 413, 182 N. Y. Supp. 761, holding market value of vacant land under condemnation by parkway commission may have as element of value prospective use for railway purposes. (Rose's Notes on United States Reports, 1932 Supp. Vol. 7, pp. 1108, 1109)

This court undoubtedly recognized the force of this part of the Chandler-Dunbar case in the Continental case and for that reason took pains to point out that the use contemplated by the land company was wholly conjectural and speculative.

The learned trial judge felt that the Continental Land Company case was controlling upon him because he felt that the same questions and the same arguments were presented in that case. In order to assure himself of this he carefully read the briefs in the Circuit Court in that case, as appears from his written ruling. (T. of R. pp. 116, 123) Speaking of the Continental Land Company's brief he said:

"Appellants then proceeded into a detailed argument of the points which I have just outlined. While the language that they used was different, I am convinced after careful study of it that, in its fundamental effect, the appellants presented there precisely the same argument as has been so ably presented by defendants' counsel here. While they cited other cases which have not been cited to me and while they failed to cite some of the cases which counsel has cited to me, it is apparent that the cases upon which they mainly relied were precisely the same cases upon which defendants rely here—Mississippi River Boom case and the Monongahela Navigation case, Olson v. United States and that portion of the Chandler-Dunbar opinion in which allowance for canal and lock purposes was approved by the Supreme Court. Of particular importance is the statement of summary and conclusion found on Page 66 of their brief as follows:

'SUMMARY AND CONCLUSION

1

'We Believe That It Is Fair to State That the Following Facts Are Established Either By Admission or By Competent Evidence.

'1. That Appellants' lands, which are taken in these proceedings, are uplands, situated above ordinary high water mark.

'2. That Appellants' uplands possess inherent adaptability for use as a damsite.

'3. That they are the only lands in existence which are suitable and available for a damsite useful for the development of hydro-electric power, and for irrigation, by using Grand Coulee as a storage reservoir.

'4. That these uses can be accomplished only by building a dam across the Columbia River at Grand Coulee and that no such dam can be built without using appellants' lands.

'5. That, at the time of taking there was a market for appellants' lands for use as a damsite by others than the Government, and that there was a "legal and practical possibility" of their being acquired and used for that purpose.

'6. That, the market value of these lands was greatly increased because of their adaptability for a damsite, and that their market value cannot be determined except by considering such adaptability." (T. of R. pp. 123, 124, 125)

What he failed to properly distinguish was this, that this court in deciding the case held that items one to four in the summary were not in themselves sufficient to justify a recovery and that items five and six were wholly devoid of proof. "There is not left the shadow of a doubt that there was no reasonable probability

of utilizing this land by private capital." (88 Fed. (2d) at page 111.) Had the Land Company had evidence to support items five and six, and had this evidence been rejected, then these cases would be indistinguishable and the lower court would have been correct. Of course, since the Land Company believed the testimony of their witnesses was sufficient to support items five and six, the cases cited were the same in general as ours, and the arguments the same, but when the court rejected the evidence as insufficient, naturally the result was different.

Further indicating how he viewed the matter Judge Schwellenbach gave an example which he stated he purposely made absurd in order to better illustrate the point that the investment in a property might be very great and the value still very small. The example he chose was that of a person who had built a very expensive and very modern hospital for nervous cases, along side the tracks and yards of a railroad company; and he pointed out that despite the heavy investment the place would have no market value for a sanitarium. (T. of R. p. 131) Granted—but assume now that the railroad was a government railroad and the government was going to condemn the sanitarium for a Veterans' Mental Hospital and it was reasonably probable that it planned to reroute the railroad through another part of town. Could the government then say: "We can keep the railroad here, and so your property is valueless, but of course as soon as we get the property we will reroute the road and use the property for the purpose for which you have spent thousands of dollars

in improving it"? Or would the court not say: "The owner is entitled to be paid what this property would bring on the market, and if the likelihood of the government's rerouting the railroad is great enough so that prospective buyers of this property would pay more for it than they would for an adjoining piece of ground which had not been improved for sanitarium purposes, the owner is entitled to have a jury determine that value from all the facts and circumstances."

Still the trial court stated that despite all this he would be inclined to allow the question to go to the jury were it not for the case of U. S. v. Appalachian Power Company, 311 U. S. 377, 85 L. ed. 243, 61 S. Ct. 291. Frankly we do not think this case is in point. It was an injunction action brought by the United States to enjoin the Appalachian Electric Power Company from proceeding with the construction of a power plant in the New River which it was alleged was a navigable river. The principal question was the factual one of the navigability of the river. The court held the river navigable and therefore the Federal government had dominion over it and could permit or forbid the erection of structures in it and since it had the power to forbid, it could permit the erection upon terms such as embodied in the licensing provision of the Federal Power Act, 16 U. S. C. Sec. 797, 799, 801, 804, 807, even though thereby "riparian rights may pass to the United States for less than their value." The court is careful to distinguish however between the right of the government to control the use of the river, which it may do without compensation to the riparian land

owner, and the right to take these riparian lands by eminent domain. As to the latter it said:

> "If the Government were now to build the dam, it would have to pay the fair value, judicially determined, [89] for the fast land; nothing for the water power.[90]" 311 U. S. 377, 427, 85 L. ed. 243, 263, 61 S. Ct. 291.
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> [89] Monongahela Nav. Co. v. United States, 148 U. S. 312, 327, 37 L. ed. 463, 468, 13 S. Ct. 622.
> [90] United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 66, 76, 57 L. ed. 1063, 1076, 1080, 33 S. Ct. 667.

This aptly illustrates the existing government policy in regard to the development of power in our navigable streams. It is in reality a partnership arrangement between the land owner or power company and the government. Neither is in a position to proceed with the development alone because one owns the fast lands essential for the abutments of the dams and the power house structures, and the other controls the flow of the river, essential to the generation of power. That of course does not mean that these elements are valueless. It simply means that the land owner can not claim the whole value for his lands, or the "hypothetical additional value of the water power." On the other hand, "If the government were to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power."

The government might have adopted many ways to dispose of its interest in the water power. It could have required an outright payment to it of a lump sum. It could have required annual payments in the

nature of rent. What it did do was to require the taking out of a license limited to 50 years, 16 U. S. C. Sec. 799, at which time the government could take over the property by paying the licensee's net investment as defined in 16 U. S. C. Sec. 804.

The Power Commission can also determine the actual legitimate original cost of, and the net investment of a licensed project, 16 U. S. C. Sec. 797. It is this provision that is most significant because it is only this "net investment" which can be capitalized and shown on the Company's books and it is this "net investment" which is used in determining the rate base of the Company. The net investment includes the lands necessary for the project as well as the structures built thereon. Only the "actual legitimate original cost" may become part of this net investment. No hypothetical additional value will be considered. Sec. 807, Title 16 U. S. C. provides that at any time after the issuance of a license the United States or any State or municipality may take over the property by eminent domain proceedings upon payment of just compensation.

As we contended in legal argument and later offered to prove, it has been repeatedly established that the actual cost of the lands, if honestly arrived at, and likewise the engineering and surveying expenses are part of the legitimate net investment. (Alabama Power Co. v. McNinch, 94 F(2) 601; Northern States Power Co. v. F. P. C., 118 Fed (2d) 141)

If the government's contention in this case is correct, we have then, this very anomalous situation. A

company, we will say the defendant, buys land on the open market, suitable for the location of a power plant, pays therefor $150,000, applies for a Federal license, spends $350,000 in engineering and surveying. The license is granted and the $500,000 is recognized as a legitimate original cost, and the next day the government or a municipality decides to condemn the property; without question the award that the condemnor must pay will have to be predicated upon a consideration of such original cost of $500,000. However, if the condemnation took place the day before the license is granted, the compensation is only the value for agricultural purposes—say $8,000.

It is to our minds illogical to claim that the granting of a license bestowed on the licensee any value that he did not have before. The whole purport and intent of the act is to limit the values to the actual market costs, but it realizes that power sites are worth more than agricultural land, that they will and do command a higher price and this higher price is legitimate. This higher price must, however, be an honest and real price, actually incurred, not an unearned incremental value, or one that is speculative or hypothetical. Appellant, The Washington Water Power Company, offered to prove (T. of R. p. 223) that such values were recognized by the Federal Power Commission in its own licensed plants and in many others, including the Puget Sound Power & Light Company plant at Rock Island in the Columbia River. There land was sold for $120,000 which had practically no value for agricultural purposes (T. of R. pp. 214, 215). It is our con-

tention, therefore, that the government operating under the restriction of the 5th Amendment cannot take our property *before* a license is granted on the theory it is only valuable for agricultural purposes, if in fact its actual value has been enhanced by the demand for similar power sites, and *on the day after a license is granted* be required to pay power site values for the same land.

Judge Schwellenbach apparently did not understand our contention that the value we were seeking was only the value that our lands, as abutment sites, would contribute to the whole project. He felt that it could have no value for power site purposes unless we had the right to use the river. As he said "None of these prospective purchasers would have been interested in it had they known that they *could not build* a dam across the river at that point." (Emphasis supplied) (T. of R. pp. 129, 130). Of course that is true, and if the law were that no one except the government could build a dam across the river it would have had no value. The situation in the Continental Land Company case was that no one but the United States could build a dam, though there the impossibility of building the dam was not a legal one, but was one created by the magnitude of of the project. Here, however, it was not a fact that the purchaser could never build a dam across the river. The fact is, that the owner could not build a dam without permission, but the likelihood of getting such permission was so great that it did affect the value. Just as in the McCandless case (298 U. S. 242, 80 L. ed. 1205, 56 S. Ct. 764), the owner would not have been entitled

to a higher price for land had it *been known he could not get the water,* yet though he did not have the water, still he was allowed a higher price because the possibility of getting the water was great enough to affect the value. Judge Schwellenbach further said: "The use of the bed of the river and the flow of the stream is inseparably connected with the use of the adjoining uplands in creating a value for power site purposes." (T. of R. p. 130) This again is true, but that does not prove that the uplands have no value as an inseparable part of the whole.

Nor does it do to say that when as part of the Grand Coulee project the Government announced that the Kettle Falls site would be submerged and no development would be permitted, that it could thereby with one hand destroy its value and with the other take it at its depreciated value.

Such action in the few instances in which it has been attempted has received the severe castigation of the courts.

In the case of In Re South Twelfth Street, 66 Atl. 568, the City of Allentown, Pennsylvania, sought to condemn a strip of land for a street. Before the value was fixed the city had plotted the street and forbidden the erection of buildings on the bed of the proposed street and then the Machiavellian minds of the city council produced the delightfully simple idea that since no buildings could be built on it, the land could be condemned for practically nothing. But the Supreme Court of Pennsylvania thought otherwise and said:

> "* * * Equally untenable is the other position taken, viz., that, if the true measure of compensa-

tion be the market value of the land when taken, the fact that no compensation could be recovered for the removal of any buildings erected on the bed of the proposed street after the same had been plotted is to be considered as a circumstance affecting such market value. *This is simply asserting the right of confiscation in a modified form, only feebly disguised.* By reason of the plotting the owner is virtually denied the privilege of building on his land, and it is argued that, with this privilege extinguished, the land would have a much reduced value in the estimation of the average buyer. *Of course, it would. But who is responsible for this reduction? Not the owner. The impairment of value resulted from nothing he had done, but as the immediate consequence of the steps taken by the municipality towards the appropriation, in invitum, of the owner's land. In the present case it is quite clear that without the right to build upon the land, this narrow strip, 60 feet wide, located as it is, would be of little, if any, value. This, then, is the contention, that the municipality in the furtherance of public ends, having stripped the land of nearly its entire value, now, when it seeks to accomplish fully its purposes in connection therewith, is to be allowed to acquire the land by paying a sum measured by the little value the municipality has left in it. Such a result would be a travesty on the constitutional provision which requires in all such cases just compensation to be made for the property taken.* * * *" 66 Atl. 568, 569 (Emphasis supplied)

The same court reaffirmed the rule when the condemnation was brought by a railroad company, Herman v. North Pennsylvania R. Co., 113 Atl. 828:

"While the 12th Street case was an instance of appropriation of land by a municipality, the early plotting and subsequent taking being by the same corporation, yet, wherever real estate, containing

> a previously plotted but unopened street is taken by the right of eminent domain, the principles announced in that authority must apply, or we would have the feebly disguised confiscation there referred to, and that to the benefit of the condemning corporation, which would pay for the land appropriated at its impaired value, and then, when the actual opening occurred, collect damages for such impairment; but, as previously noted, *such an injustice is avoided by recognizing the fact that, although the impairment of value from the plotting is noncollectible, and no damages can be had by anyone until the appropriation takes place, nevertheless all the while an inchoate right exists in the persons who own the land, so far as such impairment of value is concerned, the latter, as before said, being the 'consequence' of 'steps taken toward the appropriation.'"* (113 Atl. 828, 829) (Emphasis supplied)

In the case of In Re Gibson and City of Toronto, Am. & Eng. Ann. Cases 1914 B, 507, the Ontario Court of Appeals had before it a very similar situation. The City of Toronto was planning to widen one of its streets and passed a by-law (ordinance) "to prevent any building upon the seventeen-foot strip in the meantime and until the city expropriated it in order to widen St. Clair Avenue to that extent." However, the City was not allowed to assert this fact to acquire the land on the basis that it had no value for building purposes, the Court saying:

> "* * * It is, of course, accepted law that the value of the land to the expropriating body cannot be included as an element in the compensation. But, on the other hand, that authority ought not to be able by the exercise of its other powers immediately prior to the taking, to reduce the value of what it seeks and intends to acquire and of which

> it is contemplating expropriation." Am. & Eng. Ann. Cases 1914 B, 507, 510, 28 Ont. L. Rep. 20.

And again:

> "It would indeed be a gross abuse of the powers conferred upon the city corporation, if it should be able to use such powers to depreciate the value of property which it was about to acquire." Am. & Eng. Ann. Cases 1914 B, 507, 508, 28 Ont. L. Rep. 20.

In regard to the offers of proof, the court sustained objection to all of them on the general ground that no evidence of power site values was admissible in addition as to offers Nos. 33, 34, 40, 50, 54, 60, 65, 74 it sustained special objections.

Offer of proof No. 33 (Specification of Error No. 34) was an offer to prove by the comptroller of The Washington Water Power Company that the Company had paid $66,832.00 to the State of Washington for taxes and fees for the water rights at Kettle Falls. We think this evidence is material and admissible for the reason it shows part of the investment of the Company in the property, which in a case of this type is a p r o p e r element to be considered in arriving at just compensation. (Powellson v. U. S., 118 Fed. (2d) 79).

Offers of proof Nos. 34, 50, 54, 65, and 74 (Specification of Errors No. 35, 50, 53, 61, 68) all were offers to prove by various qualified witnesses that the price paid by the Power Company in 1921 of $156,043.33 was a fair and reasonable price for the lands at that date. Ordinarily such testimony would be immaterial, but we believe in this case it is for this reason: As previ-

ously pointed out the Federal Power Act fixes the values of licensed projects as their legitimate original cost. If the license is granted, this becomes the value of the property at which it may later be acquired. It is important and relevant to prove then that the price actually paid was a legitimate price, that represented the fair market value at that time. Were it an inflated or fictitious value, it would not represent the legitimate original cost. Nor would it be an honest element of investment such as might be shown under the authority of the Powellson case, 118 Fed. (2d) 79.

Offer of proof No. 40 (Specification of Error 41) was as follows:

> "Comes now the defendant, The Washington Water Power Company, and offers to prove by the witness K. M. Robinson, who is present in the court room and who has been sworn as a witness, that interest on the sum of the total legitimate investment of $465,785.97 for a period of three years prior to December 9, 1939, at the rate of six per cent per annum, amounted to $83,841.47; that the total net investment plus interest for a three-year period amounted to $549,627.44." (T. of R. p. 189)

and the argument made to the court in connection therewith is, we think, sufficient to present our position. It was:

> "I might just say for Your Honor's consideration that the theory on which we are interested on the second ground is that the rules and regulations of the Federal Power Commission under the Federal Power Act permits the capitalization of the cost during the three-year period prior to construction and during the period of construction, legitimate interest at the rate of six per cent to be capitalized on those projects, our theory being that

one of the elements that would enter into the determination of a buyer would be the fact that if he got his property and had to get his license he would be limited by the rules and regulations of the Federal Power Act as to the amount of money at which he could capitalize his purchase and that that element would be an element which the buyers would consider and would be an element entering into the fair market value of a piece of property where it wasn't subject to the restrictions as to capitalization and use that applies under the Federal Power Act. The general rule is that you can't add the interest as an element of the market value of your property in an ordinary building and that sort of thing, our theory being that if the value didn't change with the granting of the license that these facts are known and taken into consideration by the buyer and that we would be entitled to say what the minimum capitalized value that he could put in would be and that would enter into his thought as to what would be fair and what he could afford to pay." (T. of R. p. 190)

Offer of proof No. 60, Specification of Error No. 57, was an offer to prove by a witness familiar with the power situation in this territory that in his opinion the Kettle Falls site would have been devoted to power uses by 1939 or shortly thereafter if Grand Coulee had not been built. It was objected to as calling for a conclusion but any opinion of an expert is probably a conclusion. We think it is clearly permissible to prove by the opinion of experts the use to which property can or is likely to be devoted in the reasonably near future.

CONCLUSION

We respectfully submit, therefore, that the appellant, The Washington Water Power Company, was by the judgment of the trial court, deprived of its property without just compensation, in violation of the 5th Amendment, when the jury was not permitted to consider the effect upon the market value of the lands or the reasonable likelihood that the lands could and would be used for power purposes at the time of taking or within a reasonable time thereafter.

We respectfully submit, further, that the case should be reversed with directions to submit to a jury under proper instructions the question of the value of the property for all uses, including power site purposes.

Respectfully submitted,

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